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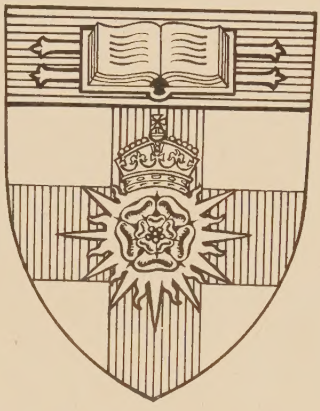

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[1916] 1 K. B. 379.

At p. 379 of the report of *Peers* v. *Caldwell* [1916] 1 K. B., towards the bottom of the page, Avory J. is stated to have said "If it was clear that these boys paid their halfpennies as entrance fees"—the word "solely" ought to come in, after the word "fees." Three lines lower down the word "solely," which follows the words "halfpenny was," should be struck out.

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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1916 *July* 26.

C. A. *Oct.* 30.

THE KING *v.* LINCOLNSHIRE APPEAL TRIBUNAL. *Ex parte* STUBBINS.

Army—Military Service—Exemption granted by Local Tribunal—Appeal to Appeal Tribunal—Notice of Appeal in prescribed Form in Duplicate not delivered—Jurisdiction of Appeal Tribunal—Military Service Act, 1916 (5 & 6 *Geo.* 5, *c.* 104), *Sched. II.—Military Service (Regulations) Order*, 1916, *reg.* 19.

By the Second Schedule to the Military Service Act, 1916, "Any person aggrieved by the decision of a local tribunal, and any person generally or specially authorised to appeal from the decision of that tribunal by the Army Council, may appeal against the decision of a local tribunal to the appeal tribunal of the area."

By regulation 19 in Part I., Section II., of the schedule to the Military Service (Regulations) Order, 1916, "Any person aggrieved

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by a decision of the local tribunal . . . . and the military representative . . . . may appeal to the appeal tribunal for the area, against the decision of the local tribunal, by delivering to the local tribunal in the prescribed form, in duplicate, notice of appeal not later than three clear days after the decision of the local tribunal, or within such extended time as, for good reason shown, the local tribunal may allow. The local tribunal shall thereupon send to the other party to the application the duplicate notice of appeal."

On February 23, 1916, a local tribunal granted the applicant total exemption from military service.

The military representative immediately announced in the presence and hearing of the applicant that he should appeal, at the same time stating his grounds. On February 26, 1916, no copies of the prescribed form of notice of appeal being available, the military representative handed to the clerk of the local tribunal a list of the names of the persons in respect of whom he intended to appeal, including the name of the applicant; and some weeks before the appeal was heard the clerk discussed the matter with the applicant.

Notwithstanding an objection by the applicant that they had no jurisdiction to hear it, upon the ground that the prescribed notice had not been given, the appeal tribunal allowed the appeal:—

Held by Lord Reading C.J. and Avory J. (Low J. dissenting), that, inasmuch as the applicant knew within the prescribed time that the appeal was pending, strict compliance by the military representative with the letter of regulation 19 by delivering to the local tribunal notice of appeal in the prescribed form in duplicate was not a condition precedent to the appeal tribunal having jurisdiction to hear and determine the appeal, and that therefore a rule nisi obtained by the applicant for a certiorari to bring up the order of the appeal tribunal to be quashed on the ground of want of jurisdiction must be discharged.

Observations upon the judicial character of military tribunals.

Held by the Court of Appeal, that the statute gave an absolute right of appeal; that the provisions of regulation 19 as to procedure were directory only and not imperative, and that non-compliance with them had not deprived the military representative of his right of appeal.

RULE NISI calling upon the appeal tribunal for Lincolnshire, Grimsby section, to show cause why a writ of certiorari should not issue to remove into the King's Bench Division of the High Court an order made by the appeal tribunal allowing an appeal of the military representative from the decision of the Winterton Local Tribunal exempting the applicant, T. R. Stubbins, from service under the Military Service Act, 1916.

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The applicant obtained the rule upon the ground that the appeal tribunal had no jurisdiction to hear the appeal, notice of appeal not having been given in accordance with regulation 19 of the Statutory Rules and Orders, 1916, No. 53, known as the Military Service (Regulations) Order, 1916.

The applicant was a bachelor of thirty-seven years of age and came under the Military Service Act, 1916. He held amongst other offices that of justice of the peace for the Parts of Lindsey, and was a wheelwright, joiner, painter, and builder, assistant overseer, rate collector, house and land agent, commission agent, and rent collector, and chairman of the Winterton Urban Council and of the Winterton Local Tribunal. On February 23, 1916, he applied to the local tribunal for exemption from military service on the ground that he was engaged on work of national importance and on the grounds of his financial and domestic obligations, ill-health, and that his occupation of a wheelwright was on the list of certified occupations. On February 23, 1916, the applicant's case was to be heard by the local tribunal, and at the commencement of the meeting of the tribunal on that date the applicant acted as chairman although the military representative objected to his presence owing to the fact that his own application was pending, and he continued to act as chairman until his application was called on, when he vacated the chair, and it was then occupied by another member of the tribunal who he suggested, without any motion to that effect, should take his place. The applicant, during the consideration of his case, stood at the left hand of and close to the new chairman. Without any discussion and without any questions being asked the local tribunal granted the applicant total exemption. The military representative immediately stated in the presence and hearing of the applicant that he should appeal on the grounds that the rate collecting could be easily arranged for and done by an older man, that there were several other wheelwrights in the town, and that the amount done by the applicant was negligible, and that no ground upon which the applicant would be entitled to exemption could be made out. On February 26, 1916, the military representative applied to the clerk to the local tribunal for copies of the prescribed form of notice of appeal. The clerk, however, informed him that he had not received any, and thereupon

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the military representative handed to the clerk a list of the names of the persons in respect of whom he stated that he intended to appeal. This list included the name of the applicant. On March 2, 1916, the clerk to the local tribunal obtained forms of notice of appeal, and he thereupon sent some to the military representative, who filled up (amongst others) one for the case of the applicant in duplicate and sent it to the clerk of the local tribunal, but the clerk did not send a copy to the applicant, although he sent one to the appeal tribunal. On March 20, 1916, the applicant went to the clerk to the local tribunal for the exemption certificate. The clerk made out the certificate in the applicant's presence and handed it to him. At that time the applicant knew an appeal was pending, as he and the clerk had previously discussed the matter. When the appeal came before the appeal tribunal on May 8, 1916, the applicant appeared and was represented by a solicitor. The solicitor took the preliminary objection to the appeal being heard that notice of appeal had not been delivered to the local tribunal not later than three clear days after the decision of the local tribunal as required by the regulations. The appeal tribunal decided that they had jurisdiction to hear the appeal. They then considered the facts and decided that the applicant was not entitled to exemption. The appeal was accordingly allowed, and the local tribunal was directed to withdraw the certificate of exemption.

By the Second Schedule to the Military Service Act, 1916 (5 & 6 Geo. 5, c. 104), clause 5, "His Majesty may by Order in Council make regulations with respect to the constitution, functions and procedure of the local tribunals, the appeal tribunals and the Central Tribunal; and, so far as provision is not made for procedure by those regulations, the procedure of the tribunal shall be such as may be determined by the tribunal.

. . . . . .

"Any Order in Council under this provision may be revoked or varied by any subsequent Order in Council and any regulations made under any such order shall, as soon as may be, be presented to Parliament."

"*Appeal.*

"1. Any person aggrieved by the decision of a local tribunal, and any person generally or specially authorised to appeal from the

decision of that tribunal by the Army Council, may appeal against the decision of a local tribunal to the appeal tribunal of the area."

By regulation 7 in Part I., Section II., of the schedule to No. 53 of the Statutory Rules and Orders, 1916, entitled the Military Service (Regulations) Order, 1916, "The Local Government Board may prescribe forms of application, notices, and certificates, and any other documents or forms necessary for facilitating the procedure of the local tribunal or the operation of the Act."

By regulation 19, "Any person aggrieved by a decision of the local tribunal . . . . and the military representative . . . . may appeal to the appeal tribunal for the area, against the decision of the local tribunal, by delivering to the local tribunal in the prescribed form, in duplicate, notice of appeal not later than three clear days after the decision of the local tribunal, or within such extended time as, for good reason shown, the local tribunal may allow. The local tribunal shall thereupon send to the other party to the application the duplicate notice of appeal."

By regulation 2 in Part II., Section I., "In any case in which the appeal tribunal are of opinion that the notice of appeal does not give the required particulars or does not disclose prima facie grounds for reviewing the decision of the local tribunal it shall be competent to the appeal tribunal to notify the appellant that unless further and better particulars or grounds, as the case may be, are given the appeal will be dismissed; and in any such case unless further and better particulars or grounds, as the case may be, are delivered to the appeal tribunal not more than three clear days after such notification has been sent by the appeal tribunal, or within such extended time as may be allowed by the appeal tribunal, the appeal shall be dismissed."

Rigby Swift, K.C., and *Branson* showed cause. The contention on behalf of the applicant is that no notice of appeal was given within the meaning of regulation 19 in Part I., Section II., of the Military Service (Regulations) Order, 1916, nor was any notice given within the required time. The right of appeal is given by the Second Schedule of the Military Service Act, 1916. The regulations only regulate the procedure on the appeal.

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Regulation 2 in Part II., Section I., shows that it is not necessary to use the exact form of appeal prescribed by the regulations. A mere defect in a notice of appeal does not affect the statutory jurisdiction of the appeal tribunal to hear it. Clause 5 of the Second Schedule to the Military Service Act, 1916, gives power to the appeal tribunal to regulate its own proceedings in cases where no regulations have been made. Regulation 19 is only directory, and compliance with its directions is not a condition precedent to the appeal being heard : *In re West Jewell Tin Mining Co.* (1)

J. N. Emery, in support of the rule. Unless regulation 19 is complied with, an appeal tribunal has no jurisdiction to hear an appeal from a local tribunal. Sect. 2, sub-s. 7, of the Military Service Act, 1916, enacts that any decision of the local tribunal shall be subject to appeal "as provided in" the Second Schedule to the Act. Clause 5 of the Second Schedule, which enables regulations to be made with regard to the functions and procedure of the tribunals, shows that the spirit of regulations with regard to the functions of the tribunal must be observed as well as those with regard to procedure. The expression "functions" means jurisdiction. In the case of a tribunal set up by specific regulations the regulations must be complied with. There is a distinction between the jurisdiction of a tribunal so brought into being and a common law Court. The tribunal has no power to vary the regulations ; in other words, it cannot confer upon itself jurisdiction by hearing an appeal where the regulations have not been complied with. The paragraph in clause 5 of the Second Schedule to the Act of 1916 which contains the words "Any Order in Council made under this provision may be revoked or varied by any subsequent Order in Council and any regulations made under any such Order shall, as soon as may be, be presented to Parliament" shows that an Order in Council made under the schedule cannot be revoked or varied except by another Order in Council. The military representative could have made an application under regulation 19 to the local tribunal to extend the time for appealing, and if the application had been refused he could have appealed to the appeal tribunal from the refusal. Persons are appointed to local tribunals in order that their knowledge of local affairs may be utilized, and the Court

(1) (1878) 8 Ch. D. 806.

will be slow to construe the regulations in a way which would tend to facilitate decisions of local tribunals being reversed.

LORD READING C.J. In this case the applicant for the writ of certiorari, Mr. Stubbins, is evidently well known in the district of Winterton, and occupies amongst various offices that of chairman of the Winterton Local Tribunal appointed under the Military Service Act, 1916. Very unfortunately he sat as chairman of the tribunal upon the day on which he knew that his appeal was coming before it until his case was called, when he vacated the chair, which was then occupied by another member of the tribunal who had been sitting until that moment with him, and stood behind the new chairman while his application for exemption was being considered.

Without saying for a moment that the members of the tribunal did not exercise their jurisdiction to the best of their capacity at the time, it is quite clear that they granted the applicant exemption from military service without discussion—it may well be, as Mr. Emery contends on his behalf, because of their knowledge of him; but nevertheless it is not surprising that, in these circumstances, it is thought that undue favour has been shown to him. It would have been better, and more in accordance with the spirit in which justice is administered in this country in all tribunals, if the applicant, when acting in his judicial capacity as chairman of the tribunal, had taken care not to sit at all on that day and had not given any colour to suggestion that the tribunal was influenced by his presence on the bench, even though he was not actually occupying the chair. But that point is not before us, and I do not propose to decide this case upon it; but as the point arises out of the facts it seems desirable that it should be noticed in order that no repetition of such an occurrence should take place. The local tribunal having granted him exemption, the appeal tribunal allowed the appeal of the military representative, and the applicant's complaint is that the appeal came before the appeal tribunal without the provisions of regulation 19 in Part I., Section II., of the Military Service (Regulations) Order, 1916, having been complied with, and that therefore the appeal tribunal had no jurisdiction to hear the appeal.

The question we have to consider is whether compliance with

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the provisions of regulation 19, not only in the spirit but in the letter, is a condition precedent to the exercise of jurisdiction by the appeal tribunal to hear appeals from the local tribunal. It is not disputed that an appeal tribunal is provided by the Military Service Act, 1916, or that jurisdiction is conferred upon that tribunal to hear an appeal from the local tribunal on the part of the person aggrieved, who may be authorized to appeal by the Army Council, and consequently it is not in dispute that the military representative was a person who could appeal to the appeal tribunal to reverse the decision of the local tribunal. But it is said that he did not give the notice of appeal which is required by regulation 19. That regulation is one of a series made by Order in Council on February 3, 1916, in pursuance of clause 5 of the Second Schedule to the Military Service Act, 1916.

The applicant being present in the room in the circumstances to which I have referred, the military representative, when the local tribunal had announced its decision exempting the applicant, at once gave verbal notice that he should appeal, at the same time stating his grounds. Within the three days mentioned in regulation 19 he handed to the clerk a list of names, including that of the applicant, which showed the cases in which he proposed to appeal. He at the same time stated to the clerk that the list contained the names of those cases in which he intended to appeal. It is not disputed that the applicant knew within three days of the decision of the local tribunal that there was to be an appeal, and it is very important to bear in mind, in considering our decision, that no case is made on the merits. But it is contended on his behalf that upon the facts there was no delivery to the local tribunal in the prescribed form in duplicate of a notice of appeal not later than three clear days from the decision of the local tribunal as required by regulation 19. In my view the contention on behalf of the applicant that there was not a strict compliance within the letter of regulation 19 is right, but it must be observed that, according to the evidence, the prescribed form had not been received at Winterton at the time.

The whole question depends upon the view we take of regulation 19. Speaking for myself, I am satisfied that the object of this regulation was to ensure that it should be brought (within three days unless

an extension of time is granted) to the knowledge of the person affected that there is to be an appeal against the decision in his favour. In the present case it is clear that the knowledge was brought to the mind of the applicant, but not "in the prescribed form, in duplicate," within the strict letter of the regulation. In my judgment it is not necessary to comply with the letter when there is a compliance with the spirit of the regulation. There is no reason apparent to me why the jurisdiction of the appeal tribunal should not be exercised when in fact the whole object of the regulation has been safeguarded. Doubtless it was intended by the regulations to prevent controversy arising as to whether notice of appeal had been given or not by providing that the notice is to be given in a prescribed form in duplicate, which involves its being given in writing; but when once it is an admitted fact that the applicant knew within the requisite time, it seems to me that it would be straining the law to say that such a technical compliance with the very words of this regulation as the applicant contends is necessary is a condition precedent to the exercise by the appeal tribunal of its jurisdiction. Consider what the effect would be if we were to hold that this technical compliance was a condition precedent. The "prescribed form," apparently, did not exist at Winterton. Presumably the military representative did not know what the form was; at any rate, he did not know it by heart and had not one available. If he had written words in the form of a letter or on a piece of paper to the effect that he intended to appeal from the decision and had handed it in duplicate to the clerk, could it then have been said that the appeal tribunal had no jurisdiction? If we were to apply the letter as strictly as has been suggested on behalf of the applicant, this Court would be bound to say that the appeal tribunal would still have no jurisdiction because the words in the regulation "in the prescribed form" had not been complied with. Again, suppose the military representative had handed in a notice of appeal in the prescribed form but not in duplicate, and the local tribunal had thereupon made out a duplicate and had sent it to the applicant, if the contention on the applicant's behalf is right, it would follow that the appeal tribunal would have no jurisdiction because the military representative when giving his notice of appeal within the three days had not delivered it in

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duplicate. It appears to me that so to hold would be a mere slavish adherence to the exact words of the regulations without appreciating that they are made in order that there should be due notice given, and consequently I am unable to come to the conclusion which Mr. Emery on the applicant's behalf asks me to come to. There is no grievance on the merits, and in spirit the regulation has been complied with, although it may be true that in the letter there has been failure to observe the provision. We are invited by Mr. Emery to go almost if not quite as far as the decisions upon the Statute of Frauds, which show that the statute is not complied with if it is necessary to connect two documents together by means of oral evidence. He contended that the list containing the names of the persons affected by the intended appeals handed in by the military representative cannot be taken notice of by us because it was accompanied by a verbal statement of the intention to appeal without that statement being in the form of a heading on the list; and again Mr. Emery would be right if we were bound to regard compliance with every letter of the regulation as a condition precedent to the exercise of the jurisdiction; but for the reasons I have given I think that the appeal tribunal had jurisdiction, and the rule must therefore be discharged.

It must not be assumed from any observation I have made that it is not necessary to give the proper notices. All I am deciding is that in the present case there has been a compliance with the regulation to such an extent and in such circumstances that the application fails.

AVORY J. I am of the same opinion. Although the question whether the certificate of exemption given to the applicant by the local tribunal was valid or not does not directly arise, I think it right to say that such a certificate granted by a tribunal of which the applicant was at the time the "standing" chairman, although he was not at the moment the sitting chairman, would probably have been held to be of no validity if it had been attacked.

With regard to the point which directly arises, I agree entirely with what the Lord Chief Justice has said, and I will only add that, as at the time when the military representative informed the applicant that he should appeal he also verbally informed him of the

grounds of that appeal, the applicant was, within the three days, in possession of all the information that it was necessary he should have as to the pending appeal.

In my judgment the words of regulation 19 do not make the service of a notice of appeal in the prescribed form in duplicate a condition precedent to the exercise of jurisdiction by the appeal tribunal. That view is confirmed to some extent by regulation No. 7, which deals with the forms and provides that the Local Government Board may prescribe forms of application, notices, and certificates, and any other documents or forms necessary for facilitating the procedure of the local tribunal or the operation of the Act. Taking that into consideration with the other regulations to which we have been referred, and having regard especially to the power of the appeal tribunal conferred by regulation 2 in Part II., Section I., of the Regulations to give further time for amending the grounds of appeal, I am satisfied that its jurisdiction does not depend upon a strict compliance with the prescribed form of the notice.

LOW J. In this case it is quite clear that the applicant has no merits on his side. It is not necessary for me to repeat what has been said in the earlier judgments of this Court with regard to the manner in which the proceedings themselves were conducted. It is equally certain that on account of his official position and his communications with the clerk to the local authority the applicant was in fact aware of what was going on; and therefore, if one merely had to consider the facts of this particular case, one would have no difficulty at all in determining it.

But in my opinion one has to consider something more than that, namely, the true construction of the regulations. I think that too much importance has been attached to the words "in the prescribed form." I agree that it could not be successfully contended, having regard to the decision in *In re West Jewell Tin Mining Co.* (1), that the mere fact that the notice of appeal was not in the prescribed form would be sufficient to prevent the appeal tribunal having jurisdiction. But it seems to me that there are two essentials to a valid notice of appeal under the regulations, apart altogether from any question of form—the first essential is writing, and the second time; and I

(1) 8 Ch. D. 806.

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cannot agree that a notice can be valid under the regulation, or that the appellate tribunal has jurisdiction to hear the appeal, unless the notice is given in writing and within the prescribed period of three days. Now it is admitted that both those matters are absent.

That being so, I am driven to the conclusion that the appeal tribunal had no jurisdiction to hear this appeal. I am the less inclined to strain matters in favour of the existence of jurisdiction because any difficulty might easily have been met by the military representative applying to the local tribunal for an extension of time, and it appears to me to be clear that if the local tribunal had refused to grant that extension an appeal would have lain from that refusal.

For these reasons I regret that I am unable to concur with the judgments of the other members of the Court.

Rule discharged.

J. E. A.

The applicant appealed.

Oct. 30. *J. N. Emery*, for the appellant.

Rigby Swift, K.C., and *Branson*, for the respondents.

The arguments were the same as in the Divisional Court.

The following cases were cited: *Hughes* v. *Wavertree Local Board* (1); *Teddington Urban Council* v. *Vile* (2); *Hope* v. *Hope*. (3)

SWINFEN EADY L.J. This is an appeal by T. R. Stubbins from an order of a Divisional Court discharging a rule nisi for a certiorari which had been obtained by him, and which the appellant asks this Court to make absolute. It was a rule to remove into Court an order made by the Appeal Committee for Lincolnshire sitting at Grimsby allowing the appeal of the military representative from the Winterton Local Tribunal. Stubbins had obtained a certificate of exemption from the Winterton Local Tribunal; the military representative appealed, and the appeal tribunal held that Stubbins was not exempted. Stubbins contends now that their order should

(1) (1894) 10 Times L. R. 357. (2) (1906) 70 J. P. 381.
(3) (1854) 4 D. M. & G. 328, 342.

be quashed on the ground that the appeal tribunal had no jurisdiction.

The facts are these. Stubbins, who was a bachelor aged thirty-seven, claimed exemption from military service on certain grounds. He was the chairman of the local tribunal, and was sitting with them on the day on which his own application for exemption came before them. He was asked not to sit, but the suggestion was not acted upon. He sat as chairman until his own case was called on, when he suggested that another member of the tribunal should take the chair. This was done, and it was at once moved and seconded and carried that he should have total exemption. Thereupon the military representative at once gave verbal notice of appeal in the presence of Stubbins. Three days afterwards the military representative applied to the clerk of the tribunal for the necessary forms of appeal, but was told that he had none ; he then handed to the clerk a list of the names of the cases in which he intended to appeal, including the case of Stubbins. This was on February 26. On March 2 the clerk received the forms, and handed them to the military representative the same day, who filled them up in duplicate ; the clerk then sent one to the appeal tribunal and one to the Local Government Board. He did not send one to Stubbins ; he said that Stubbins knew that an appeal had been lodged, as they had previously discussed the matter together.

On the facts it is manifest that Stubbins had full notice of the intention of the military representative to appeal, but the case was argued on the ground that the appeal tribunal had no jurisdiction because regulation 19 as to the giving of notice of appeal had not been complied with modo et forma.

The Military Service Act, 1916, s. 2, sub-s. 7, provides that "The local tribunal, appeal tribunal, and central tribunal shall be constituted in accordance with the provisions of the Second Schedule to this Act, and any decision of the local tribunal or appeal tribunal shall be subject to appeal as provided in that schedule." Turning to the Second Schedule we find that it consists of two parts, dealing respectively with "constitution of tribunals" and "appeal," the latter providing that "any person aggrieved by the decision of a local tribunal, and any person generally or specially authorized to appeal from the decision of that

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tribunal by the Army Council, may appeal against the decision of a local tribunal to the appeal tribunal of the area" ; so that the right of appeal is in terms directly given by statute. As to procedure, paragraph 5 provides that by an Order in Council regulations may be made "with respect to the constitution, functions, and procedure of the local tribunals, the appeal tribunals, and the central tribunal ; and, so far as provision is not made for procedure by those regulations, the procedure of the tribunal shall be such as may be determined by the tribunal." Then by regulation 7 the Local Government Board "may prescribe forms of application, notices, and certificates, and any other documents or forms necessary for facilitating the procedure of the local tribunal or the operation of the Act." Regulation 19 has reference to appeals ; it provides that "any person aggrieved by a decision of the local tribunal . . . . and the military representative . . . . may appeal to the appeal tribunal for the area, against the decision of the local tribunal, by delivering to the local tribunal in the prescribed form, in duplicate, notice of appeal not later than three clear days after the decision of the local tribunal, or within such extended time as, for good reason shown, the local tribunal may allow. The local tribunal shall thereupon send to the other party to the application the duplicate notice of appeal." It is contended by the appellant that the provisions of regulation 19 are imperative, and that, unless they are complied with, there is no right of appeal. The respondent contends that those provisions are directory only, and that, if they are not complied with, it is not fatal to the right of appeal. It would be strange if the appellant were right in his contention, for he would have no control over the acts of others, and as acts have under the regulation to be done by the local tribunal the strange result would be that his appeal would be rendered abortive if the local tribunal failed in any way to comply with the requirements of the regulation. I am of opinion that the provisions of the regulations are directory only ; the right of appeal is given by statute, and the regulations prescribe the mode in which the appeal is to be carried out. It will be observed that the regulations, which provide that an appeal may be brought in a particular manner, do not provide that it shall not be brought in any other manner, and it is sufficient to say that on the construction of the regulations they are

manifestly directory only. Here the military representative has done all that was possible and all that was necessary to bring the case properly before the appellate tribunal. There is a well-known distinction between a case where directions are imperative and a case where they are directory, and here they are the latter. In my opinion the appeal fails and must be dismissed.

BANKES L.J. I agree. The question is whether the appeal committee had jurisdiction to entertain the appeal. That depends upon the construction of the Military Service Act, 1916, and some of the regulations made under it. It seems plain that neither the military representative nor the clerk of the local tribunal strictly complied with the directions in regulation 19. There are a number of cases in the books where non-compliance with regulations has deprived an appellate Court of jurisdiction; it will be sufficient to refer to *Lockhart* v. *Mayor of St. Albans*. (1) And there are cases in which regulations have been held imperative as to part and directory as to part; of these an example is *Hughes* v. *Wavertree Local Board*. (2) And there are many cases also in which they have been held to be directory only. The Military Service Act, 1916, provides in the plainest terms that persons aggrieved, including the military representative, shall have an absolute right to appeal. I think we must consider the case from the point of view of the party aggrieved. He has an unrestricted right of appeal, and under clause 5 of the Second Schedule to the Act "His Majesty may by Order in Council make regulations with respect to the constitution, functions, and procedure of the local tribunals, the appeal tribunals, and the central tribunal; and, so far as provision is not made for procedure by those regulations, the procedure of the tribunal shall be such as may be determined by the tribunal." It is plain that the Legislature was there contemplating regulations which should be merely directory. It is possible to decide the case on the narrow ground that, where no regulations for procedure have been published by Order in Council, the procedure to be followed shall be that determined by the tribunal, and that this was done in the present case as no regulations for the procedure of the appeal tribunal had been published; but I prefer to rest my decision on the ground that the regulations are

(1) (1888) 21 Q. B. D. 188. (2) 10 Times L. R. 357.

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not in their nature imperative, but that they are directory only. Under all these circumstances the appeal fails.

A. T. LAWRENCE J. I am of the same opinion. It is not possible to read regulation 19 as containing imperative directions.

Appeal dismissed.

Solicitors for appellant: *Childs, Harling, Reid & Wilson, for R. A. C. Symes, Scunthorpe.*

Solicitors for respondents: *Sharpe, Pritchard & Co.*

W. J. B.

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Oct. 20.

BURBURY *v.* JACKSON.

Bastardy—Corroboration—Evidence of Opportunity—Bastardy Laws Amendment Act, 1872 (35 *&* 36 *Vict. c.* 65), *s.* 4.

On the hearing of a bastardy summons evidence of mere opportunity is not sufficient corroboration of the evidence of the mother to satisfy s. 4 of the Bastardy Laws Amendment Act, 1872.

CASE stated by justices of Warwickshire.

A complaint was preferred by one Gwendolen Jackson against the appellant charging that he was the father of a bastard child of which she was delivered on February 14, 1916. At the hearing the following facts were proved or admitted:—The respondent, who at the time of the birth was fifteen years of age, was residing during the year 1915 with her parents in a cottage adjoining Crew Farm, Kenilworth. She was employed to do light jobs on the farm occupied by the appellant's father. Her duties were, amongst other things, to feed the calves and prepare their food, which necessitated her being frequently in a certain barn in the farmyard. The appellant lived at Crew Farm with his father, a part of his duty being to look after an engine in the barn used for cutting chaff. His duties necessitated his being frequently in the barn at the same time as the respondent. Other men were employed on the farm, and one man used to sleep in the barn buildings. The barn was situate

close to the road, and persons passing through the farmyard to the road would pass the door of the barn. The respondent alleged that the appellant had connection with her in the barn or cowsheds or loft above on frequent occasions and that the child of which she was delivered was the result of such intercourse. She denied that any other man had had connection with her. No one had seen any acts of familiarity between the appellant and the respondent. The corroborative evidence adduced on behalf of the respondent was the testimony of the mother, who stated that she frequently passed through the farmyard and generally looked to see if her daughter was engaged in the cowsheds or barn, and that she had seen the appellant in the barn at the same time as her daughter; that it was usual for them to be together at their work; and that when she had seen them together they were engaged in their respective duties.

The justices were of opinion that the evidence of the respondent's mother was corroborative of that of the respondent inasmuch as it proved that the appellant had opportunity of connection with the respondent in the barn. They accordingly adjudged him to be the father of the child.

Sturge, for the appellant. There was no sufficient corroboration. The facts of the case are practically identical with those of the Scottish case of *Dawson* v. *McKenzie* (1), where in an action of affiliation and aliment it was proved that the parties had been in the habit of meeting frequently and spending some time in each other's company. These meetings would have afforded opportunity for connection, but they were not accompanied by any element of suspicion, and there was no proof of familiarities. The sheriff made a decree in favour of the pursuer. On appeal the Court of Session held that opportunity alone will not amount to corroboration of the pursuer's evidence unless it is of such a character as to bring in the element of suspicion, or has a complexion put upon it by statements made by the defender which are proved to be false, and they allowed the appeal. In *Harvey* v. *Anning* (2) it was held that evidence of the parties being seen together repeatedly in the evenings in country lanes amounted to corroboration, but there there was a

(1) 1908 S. C. 648. (2) (1902) 87 L. T. 687.

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difference in their social position which rendered the fact of their walking out together of itself suspicious. In *Reffell* v. *Morton* (1) Bray J. suggested that it could not be "a material particular that the appellant was sleeping alone that night and that the girl was sleeping in the same house. Of course such a state of things tends to make the conduct alleged possible, but, in my opinion, that is not sufficient."

No counsel appeared for the respondent.

LORD READING C.J. The question is whether on the facts found there was sufficient corroboration of the evidence of the girl to satisfy s. 4 of the Bastardy Laws Amendment Act, 1872. The corroboration relied on is the evidence of the girl's mother, who said that she had on several occasions seen the appellant and the girl together in the barn, in which, according to the girl's evidence, the connection took place. It appeared that both the girl and the appellant were employed by the same employer, and that in the course of their respective employments they were frequently required to be in the barn at the same time. That is the whole of the evidence, and the question is whether where the parties by the nature of their employment have opportunity of intercourse that is of itself corroboration. In my opinion it is not. To hold that it was would lead to startling results, and the protection afforded by the requirement of corroboration in s. 4 would largely disappear. The evidence here shows nothing more than that it was possible to have committed the misconduct at the material date. That is not enough. The evidence must show that the misconduct was probable. If the parties were seen in the neighbourhood of a wood or other dark place where they had no occasion to be that might possibly be corroborative evidence. So in the case cited of *Harvey* v. *Anning* (2) the fact of persons of different social positions being seen together in lanes was held enough. It is dangerous to lay down any general rule as to what evidence will suffice for this purpose; it is enough to say that mere opportunity will not.

RIDLEY J. I am of the same opinion. Opportunity raises no presumption here, for both parties were required by their employ-

(1) (1906) 70 J. P. 347. (2) 87 L. T. 687.

ment to be together in the place by which the opportunity was afforded. 1916

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Low J. I agree.

Appeal allowed.

Solicitors for appellant: *Andrew, Wood, Purves & Sutton, for R. A. Rotherham, Coventry.*

J. F. C.

THE KING *v.* CHRIST'S HOSPITAL GOVERNORS. *Ex parte* DUNN.

1916
June 22.

Charity—Scheme for Administration of Christ's Hospital—"Recommendation" of Almoner—Discretion of Governors to refuse to appoint—Mandamus.

Clause 19 of the scheme made under the Endowed Schools Act, 1869, for the management of Christ's Hospital provides that a certain number of the Council of Almoners shall be appointed by the governors "on the recommendation of," among other bodies, the Lord Mayor and Aldermen of the city of London. The governors, who contended that they had a discretion as to appointing a person so recommended, refused to appoint a person recommended by the Lord Mayor and Aldermen:—

Held, (1.) that the word "recommendation" in clause 19 must be construed as a nomination upon which the governors were bound to act, and (2.) (Avory J. doubting) that, in the circumstances, mandamus was the proper remedy to compel the governors to perform the duty of appointing the person recommended.

RULE NISI calling upon the governors of Christ's Hospital to show cause why a writ of mandamus should not issue commanding them to appoint Sir William Henry Dunn, Knight, to be a member of the Council of Almoners of the hospital.

By clause 16 of the scheme of 1890, made under the Endowed Schools Act, 1869, for the administration of Christ's Hospital, the general administration of the foundation and the endowments thereof was, subject to such duties and powers as were conferred upon the governors, vested in the Council of Almoners.

Clause 17 provided that the Council of Almoners should consist of not more than forty-three persons or almoners, of whom two were to be ex-officio almoners and the rest were to be nominated almoners.

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Clause 19: "The nominated almoners shall be competent persons duly qualified to discharge the duties of the office, and shall be appointed as follows, that is to say: Twenty by the governors directly . . . . and twenty-one by the governors on the recommendation of the following bodies and persons respectively, in the following proportions, that is to say: Six on the recommendation of the Lord Mayor and Aldermen of the city of London . . . .; six on the recommendation of the School Board for London; one on the recommendation of the Lord President [of the Privy Council] or other the chief Minister of Education for the time being; one on the recommendation of the [Admiralty]; two on the recommendation of the Hebdomadal Council of the University of Oxford; two on the recommendation of the Council of the Senate of the University of Cambridge; two on the recommendation of the Senate of the University of London; and one on the recommendation of the President and Council of the Royal Society. . . . . The person recommending, or the chairman or other presiding officer of each meeting at which a recommendation for the appointment of any nominated almoner or almoners shall be made, shall forthwith cause the name or names of the person or persons so recommended to be notified . . . . to the governors . . . . Any appointment of a nominated almoner not made as aforesaid within six calendar months from the date of this scheme, or from the date of the notice hereinafter prescribed of the occurrence of a vacancy, as the case may be, shall for that turn be made on the recommendation of the Council of Almoners."

Clause 20: ". . . . As soon as conveniently may be after any vacancy a new nominated almoner shall be appointed under the provisions herein contained . . . . Notice of every vacancy of the office of nominated almoner shall be given as soon as conveniently may be by or under the direction of the Council of Almoners to the governors, and to the body or persons, if any, entitled to recommend."

Clause 145: "Religious opinions or attendance or non-attendance at any particular form of religious worship shall not in any way affect the qualification of any person for being one of a governing body under this scheme."

Sir William Dunn in his affidavit stated that he, being a competent person and duly qualified to discharge the duties of the office, was

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duly recommended and nominated on April 13, 1915, by the Lord Mayor and Aldermen to take the place of Sir George Wyatt Truscott, who had resigned his position as almoner; that the resolution of the Court of Aldermen nominating and recommending him was duly communicated to the governors of Christ's Hospital; that on July 7, 1915, the governors declined to accept the recommendation and nomination; that on such refusal being communicated to the Lord Mayor and Aldermen the Court of Aldermen passed a further resolution requesting the governors to appoint him, and failing their compliance that they be called upon to show cause for their refusal; that on October 6, 1915, the governors adhered to their rejection of the said recommendation and nomination; that he was informed and believed that the reason why several of the governors voted against his appointment was the fact that he was a Roman Catholic. He referred to clause 145 of the scheme, which showed that the scheme was intended to be wholly unsectarian; and he submitted that the governors were bound in law to appoint as almoner any competent and duly qualified person duly recommended and nominated by the Lord Mayor and Aldermen.

Sir Joseph Savory, Bart., an Alderman of the city of London, a member of the governors of Christ's Hospital, and vice-chairman of the Council of Almoners, in an affidavit in reply, stated that he acted as chairman of the general court of governors on July 7 and October 6, 1915, when the recommendation and nomination of Sir William Dunn was considered; that he caused to be read clause 145 of the scheme, and that the point that religious opinions could not in any way affect the qualification of any person for being one of the governing body was made perfectly clear to the meeting; that the recommendation of Sir William Dunn was bona fide considered and decided on by the governors at both the meetings, and that they were prepared and willing to consider any other recommendation that might be made by the Lord Mayor and Aldermen.

Sir R. B. Finlay, K.C., and *G. Cecil Whiteley*, on behalf of the governors, showed cause. By clause 19 of the scheme the governors are not bound to appoint any one whose name may be put forward by one of the nominating bodies. The fact that the word used is

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"recommend" shows that the governors have a discretion as to appointing the person "recommended." In this case the governors have bona fide exercised their discretion in declining to appoint the applicant, and in those circumstances the Court should discharge the rule. Further it is the settled practice that mandamus will not be granted where there is another appropriate remedy: per Wills J. in *Reg.* v. *Registrar of Joint Stock Companies* (1); and in this case there are other appropriate remedies open to the applicant, namely, by proceedings to have the question decided under s. 28 of the Charitable Trusts Act, 1853—see *Reg.* v. *Charity Commissioners for England and Wales* (2)—or by action against the governors.

Sir John Simon, K.C., and *McCardie*, in support of the rule. The governors have no discretion to refuse to appoint a person duly qualified to fill the office and recommended for appointment. When clause 19 of the scheme is read as a whole it is impossible to believe that the intention was to give the governors a discretion as to rejecting any person duly recommended. The clause provides that the "nominated almoners . . . . shall be appointed" on the recommendation of the various bodies. The governors clearly could not reject the person recommended by any of the other bodies mentioned in the clause—for example, the person recommended by the Lord President of the Privy Council or by the Universities.

On the question of mandamus, no other equally convenient, beneficial, and effectual remedy is open to the applicant, and therefore mandamus will lie: see *Reg.* v. *Leicester Guardians.* (3)

DARLING J. Although the language of this scheme is open to considerable doubt, and there is a great deal to be said in favour of the argument on both sides, I have come to the conclusion that the rule should be made absolute. The difficulty arises out of the language of clause 19, the meaning of which I understand to be this, that the almoners, being competent persons duly qualified to discharge the duties of the office, shall, in effect, be appointed, twenty of them by the governors directly, and twenty-one of them by the Lord Mayor and Aldermen of the city of London and certain

(1) (1888) 21 Q. B. D. 131, 136. (2) [1897] 1 Q. B. 407.
(3) [1899] 2 Q. B. 632.

other bodies, but those bodies are not required to keep a list of the almoners of Christ's Hospital and whenever they see that there is a vacancy among their almoners appoint somebody to fill it; the governors are to keep the list, and when a vacancy occurs among the almoners—other than those appointed directly by themselves—they are not entitled to choose some one to fill it; the vacancy is to be filled "on the recommendation" of one of the named bodies. The word "recommendation" is not there used in its ordinary sense as when one says "I recommend you to do so and so," or as when a doctor says to his patient "I recommend you to take a change of air." Although put in the form of a recommendation, the clause really empowers those bodies to say "We nominate such and such a person, and you must appoint him an almoner; we cannot put him there ourselves; you are the governors of the institution and you have the means of including him in the list." I think that what was in the minds of those who framed the scheme was something equivalent to a *congé d'élire*, which, though in words a permission or invitation to elect, is really a command to do it. So here a nomination is called a "recommendation." The most definite language has not been used, but, as I have said, I think the word "recommendation" is used not in the mild sense, but as really meaning a nomination.

There now remains the question whether in this case mandamus is the proper remedy. I think it is. The language used in *Reg.* v. *Leicester Guardians* (1) made perfectly clear what had long been the law as to mandamus. I do not think that either of the processes suggested here as alternative remedies is equally convenient, beneficial, and effectual. This matter was properly brought before the Court on an application for mandamus, and the rule must be made absolute.

AVORY J. I am of the same opinion, but I have been influenced in coming to that conclusion chiefly by those provisions of clause 19 which entitle persons like the Lord President of the Privy Council, the Lord High Admiral, the Universities of Oxford and Cambridge, the University of London, and the Royal Society to recommend persons for election. I cannot believe that it was intended that the

(1) [1899] 2 Q. B. 632.

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AVORY J.

governors of this charity should have a discretion to refuse to elect persons recommended by authorities such as those. For that reason I come to the conclusion that the governors are bound to elect persons who are recommended by the Corporation of the city of London.

On the other point I entertain considerable doubt whether the remedy under s. 28 of the Charitable Trusts Act, 1853, is not an equally convenient, if not a more convenient, remedy, and if the case had turned on that point alone I should have been disposed so to hold, but as the applicant succeeds on the merits, I do not differ on the form of the remedy.

HORRIDGE J. I agree with Darling J.'s construction of clause 19 of the scheme. On the question of remedy, Field J. in *Reg.* v. *Registrar of Joint Stock Companies* (1) said that "A mandamus ought not to be granted where another remedy is provided, which is not less convenient, beneficial and effectual." Similar language was used by Darling J. in the later case of *Reg.* v. *Leicester Guardians.* (2) In this case I can see no remedy which is as beneficial as mandamus. Neither an action in Chancery, nor an application under s. 28 of the Charitable Trusts Act, 1853, limited as it is by s. 43, would be as satisfactory a remedy as mandamus.

Rule absolute.

Solicitors for applicant: *Charles Russell & Co.*
Solicitor for governors: *Sir R. Melvill Beachcroft.*

(1) 21 Q. B. D. 131, 135. (2) [1899] 2 Q. B. 632.

J. S. H.

[COURT OF CRIMINAL APPEAL.]

1916
Oct. 16.

THE KING *v.* KENNAWAY.

Criminal Law—Evidence—Corroboration of Accomplice—Cross-examination of Prisoner as to another Offence—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1.

On the trial of a prisoner for forgery of a will two accomplices were called for the prosecution, who deposed that the will was forged by the prisoner in pursuance of a scheme by which they were to endeavour fraudulently to obtain an advance from third persons to a legatee under the will on the faith of his legacy. One of the accomplices was to figure as the legatee and the other as an executor. They said that the prisoner told them that he objected to appearing as executor himself because he had forged a will under a similar scheme some years before, that on that occasion he had played the part of executor, and that if he did it again suspicion might be directed to him. The prisoner gave evidence in his own defence, and denied, amongst other things, the accomplices' statement that he had admitted the earlier forgery. In cross-examination counsel for the prosecution went into details of that earlier forgery and asked questions tending to show that the prisoner had in fact committed it:—

Held, that the cross-examination was rightly admitted. If the prisoner had in fact been guilty of a similar forgery in connection with the earlier will, the probability was that the accomplices' story that he told them so and gave that as his reason for not being executor under the later will was true, and therefore the answers to the questions might afford corroboration of their evidence. The cross-examination was consequently relevant to the issue at the trial, and was not open to objection under the Criminal Evidence Act, 1898.

Appeal to the Court of Criminal Appeal against a conviction.

The appellant was tried with one Hann at the Central Criminal Court before Lawrence J. on a charge of forging and uttering a will contrary to s. 2, sub-s. 1 (*a*), of the Forgery Act, 1913. Two other men, named Bruce and Vaughan, who said that they had joined in a conspiracy with the appellant and Hann to forge and utter the will, had already been convicted. They were called as witnesses against the appellant and gave evidence to the following effect: The scheme of the conspiracy was not to defraud the estate of the testatrix, but to defraud third persons by getting them to

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advance money to the legatee under a fictitious will on production of the probate. It was essential to the success of this scheme that the person whose will was to be forged should have died sufficiently recently to ensure that probate of a real will should not already have been granted. Accordingly Vaughan under the appellant's instructions went to the offices of several registrars of deaths and obtained the names of six or seven persons who had died within the preceding three months. From among those names the appellant selected that of a Miss Jane Augusta Leete, of 29, Wilberforce Road, Finsbury Park. He went to Somerset House and ascertained that no will of that lady had been proved, and thereupon proceeded to forge a will purporting to have been made by Jane Augusta Leete, of Elmfield House, Bath, and himself signed in different handwritings the names of the testatrix and of the attesting witnesses. By that will there was among other legacies one of 2000*l.* to a legatee who was to be represented by the prisoner Bruce. The part of the executors was to be played by the prisoners Hann and Vaughan. It had been originally suggested that the appellant should be one of the executors, but, according to the statement of Bruce and Vaughan, he told them that he had played the part of executor in a similar fraud eighteen years before in connection with the forgery of the will of a Miss Fisher, and suspicion would point to him if he played the same part again. Accordingly Vaughan was substituted for the appellant as executor. A certificate of Miss Leete's death having been obtained, Hann and Vaughan swore the value of her estate at 2510*l.* 17*s.* 6*d.*; they paid estate duty upon that amount, and obtained probate. They then attempted to obtain an advance from third persons to Bruce as being a legatee for 2000*l.*

The appellant went into the witness-box and denied, inter alia, the statement of Bruce and Vaughan that he had admitted the earlier forgery of Miss Fisher's will. In cross-examination of the appellant counsel for the prosecution went into details of that earlier forgery and asked him questions tending to show that he had in fact committed it. He also produced Miss Fisher's will, and asked the appellant whether there was not a strong resemblance between the handwriting of Miss Fisher's forged signature and that of one of the witnesses to Miss Leete's will. The admission of these questions was objected to as offending against s. 1 (*f*) of the Criminal

Evidence Act, 1898, which provides that "A person charged and called as a witness in pursuance of this Act shall not be asked . . . . any question tending to show that he has committed . . . . any offence other than that wherewith he is then charged," but the judge allowed them on the ground that the answers might tend to corroborate the accomplices' story. The appellant was found guilty, and, several previous convictions having been proved against him, he was sentenced to ten years' penal servitude. He appealed against the conviction on the grounds, amongst others, of the wrongful allowance of the cross-examination, and that the evidence did not support a conviction under the section under which he was charged.

E. Swan (*H. W. Wickham* with him), for the appellant. The appellant was indicted under s. 2, sub-s. 1 (*a*), of the Forgery Act, 1913, and convicted of a felony; but there was no evidence on which such a conviction could be supported. The will which was forged was that of a fictitious person; it was not intended to be the will of the real Jane Augusta Leete, for there was no intention to defraud her estate. For the prisoner's purposes the name of any person who was dead would have done equally well, and in order to show that the real Miss Leete was not intended the testatrix was described as of Elmfield House, Bath, a non-existent address. It is not disputed that the will, although that of a fictitious person, was a forgery under the Forgery Act, 1913, for by s. 1, sub-s. 1, "For the purposes of this Act, forgery is the making of a false document in order that it may be used as genuine," and by sub-s. 2 "A document is false . . . . (*b*) if the whole or some material part of it purports to be made by . . . . a fictitious or deceased person." Then s. 2, which deals with the punishment for forgery, provides that forgery of certain documents, including "any will . . . . either of a dead or of a living person," shall be felony and punishable with penal servitude for life. But it says nothing about the will of a fictitious person. The effect of the two sections is that the fraudulent making of such a will, although a forgery, is not a forgery which is punishable as felony. Its quality and punishment are left to be dealt with under s. 4, sub-s. 1, which provides that "Forgery of any document, which is not made felony under this or any other

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statute for the time being in force, if committed with intent to defraud, shall be a misdemeanour and punishable with imprisonment with or without hard labour for any term not exceeding two years."

Secondly, the judge was wrong in allowing the cross-examination of the appellant, for it was directed to proving that he had been guilty of an offence other than that which was the subject of the charge before the Court, which is the very thing that the Criminal Evidence Act prohibited. It would be a dangerous precedent to admit such evidence merely on the ground that it tended to corroborate an accomplice.

R. D. Muir and *H. D. Roome*, for the prosecution (who were called upon only with reference to the admissibility of the cross-examination). If the appellant in fact forged the earlier will of Miss Fisher, that would be a good reason for his being reluctant to appear as executor under Miss Leete's will, and as it would be necessary to account to his confederates for such reluctance, the probability is that he gave that fact as his reason. Therefore the fact of his guilt in connection with Miss Fisher's will would tend to corroborate their evidence, and they swore that they saw him sign Miss Leete's name and that of the two witnesses to her will. Further, the suggested resemblance between the handwriting of the signature to Miss Fisher's will and that of one of the attesting witnesses of Miss Leete's will was admissible for the same purpose. If the cross-examination was relevant to the charge before the Court it did not cease to be so because it also showed that the appellant had committed another offence. The provision of the Criminal Evidence Act was only meant to exclude evidence of irrelevant offences.

E. Swan in reply.

The judgment of the COURT (Lord Reading C.J., Darling and Avory JJ.) was delivered by

LORD READING C.J. The appeal before us was based upon two grounds. First it was contended that the appellant could not upon the evidence be convicted of a felony under s. 2, sub-s. 1 (*a*), but only of a misdemeanour under s. 4. It was not disputed that he had committed a forgery, but it was said that it was not a forgery which was punishable as a felony with penal servitude. The point

argued was that as the will purported to be that of Jane Augusta Leete, of Elmfield House, Bath, and as the real Jane Augusta Leete lived at 29, Wilberforce Road, Finsbury Park, and as there was no intention to defraud the estate of that lady, the will was to be regarded as the will of a fictitious person, and that, that being so, it was not the "will . . . . of a dead . . . . person" within the meaning of s. 2. It was said that that section must be read along with s. 1, sub-s. 2 (*b*), and that, as the latter sub-section drew a distinction between a document purporting to be made by a fictitious person and one purporting to be made by a deceased person, s. 2, sub-s. 1 (*a*), when speaking of the will of "a dead person" must be understood as excluding that of a fictitious one. The short answer to that is that this was not the will of a fictitious person. Jane Augusta Leete was a real person, and the fact that the forger misstated her address did not make her any the less real. She was a person who had lately died, and the prisoners who pretended to be the executors of her will actually used the certificate of her death as a means of obtaining probate, and in their estate duty affidavit they described her as "of 29, Wilberforce Road, Stoke Newington, formerly of Elmfield House, Bath." The assumption of fact therefore on which the point of law was based fails. But it must not be assumed that we view with any favour the contention that if the will had been that of a fictitious person the forgery of it would not have been a felony.

The second point argued was that the cross-examination as to the forging of Miss Fisher's will was inadmissible because under the Criminal Evidence Act, 1898, a person charged and called as a witness cannot be asked questions tending to show that he has committed an offence other than that with which he is charged. It is not necessary to repeat what has often been stated in this Court, that evidence which is otherwise admissible will not be inadmissible merely because it may show that the prisoner has committed other offences. Here, if the object of the cross-examination had been merely to elicit the fact that the appellant committed the earlier forgery it would have been inadmissible. But when one comes to consider that, according to the statements of Bruce and Vaughan, the appellant objected to being executor of Miss Leete's will upon the ground that he had forged and obtained probate of a

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similar will eighteen years before, and that suspicion might attach to him if he appeared in that character again, and that it was part of the arrangement between them that he should not appear as executor, it cannot be said that evidence that he in fact forged the earlier will was not evidence tending to corroborate that of the accomplices, for if he in fact did forge it the probability is that he told them so and gave that as his reason for refusing to be executor again. No doubt proof of the fact that he committed the earlier crime would not conclusively prove that he told them he had committed it, but it would be evidence to support their statement that he did. We are of opinion, therefore, that the judge was right in allowing the cross-examination, and that the appeal fails.

Appeal dismissed.

Solicitors for appellant: *Wilson, Lambert & Midgley.*
Solicitor for the Crown: *Director of Public Prosecutions.*

J. F. C.

INVERKIP STEAMSHIP COMPANY, LIMITED *v.* BUNGE & CO.

1916
Nov. 9.

[1915 I. 1408.]

Ship—Charterparty—Demurrage—Period of Demurrage not specified—Detention of Ship beyond a Reasonable Time—Damages.

A charterparty contained the following clause:—"Steamer to be loaded . . . . with customary berth despatch, and if detained longer than five days . . . . charterers to pay demurrage at the rate of fourpence British sterling . . . . per net register ton per day . . . . provided such detention shall occur by default of charterers or their agents." At the expiration of a reasonable time from the termination of the lay days the charterers had not commenced to load the steamer, whereupon the shipowners gave notice to the charterers that they would no longer accept payment for the detention at the demurrage rate, but would claim damages. The charterers protested against this and referred to the charterparty, which, they said, defined the rights of the parties. The steamer having been detained longer for the purpose of loading, the shipowners claimed damages for the detention beyond the reasonable time:—

Held, that the demurrage rate of compensation applied to the whole period the steamer was detained for the purpose of loading, and therefore that the shipowners were not entitled to claim damages, as distinguished from the demurrage rate, for the extra period of detention.

Western Steamship Co. v. *Amaral Sutherland & Co.* [1913] 3 K. B. 366 followed.

Dictum of Lord Trayner in *Lilly & Co.* v. *Stevenson & Co.* (1895) 22 R. 278 not followed.

ACTION tried by Sankey J. as a commercial cause.

The plaintiffs, the owners of the steamship *Inverkip*, claimed damages from the defendants, the charterers, for thirteen days' detention of the vessel from September 17 to September 29, 1915, at 200*l.* per day.

By the charterparty the vessel was to proceed to New Orleans or Galveston and load a grain cargo for a safe port in the Mediterranean not east of the west coast of Italy and excluding Africa, "steamer to be loaded according to berth terms, with customary berth despatch, and if detained longer than five days, Sundays and holidays excepted, charterers to pay demurrage at the rate of fourpence British sterling, or its equivalent, per net register ton

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per day, or pro rata, payable day by day, provided such detention shall occur by default of charterers or their agents." The charterparty also contained this clause: "Time for loading, if required by charterers, not to commence before August 25, 1915."

The *Inverkip* was to have loaded at Galveston, but owing to serious damage to that port by a tidal wave she was directed to load at Newport News, where she arrived on August 18. Her lay days began on August 25, but owing to the difficulty of getting the grain to that port, the congestion of the port, and the fact that a grain elevator there was destroyed by fire, there was great delay in the loading. Demurrage at the agreed rate, which amounted to 46*l.* 15*s.* 4*d.* per day, was paid by the defendants from September 1 to September 17. On the latter date, the loading not having then been begun, the plaintiffs' solicitors wrote as follows to the defendants: "We are instructed to give you notice that our clients contend that the vessel is no longer on demurrage and that as from this date they will claim damages for detention, which they estimate at 200*l.* per day. They have therefore instructed the master not to accept any further payment of demurrage." To that letter the defendants replied: "We must protest against the course which the owners threaten to adopt, and must refer them to the charterparty, which defines the rights of the parties." The vessel waited for her cargo, and the defendants tendered the demurrage rate day by day till September 29, on which date the loading was completed, but as it was refused by the master it was deposited and the defendants brought the amount into Court.

The plaintiffs contended that it was an implied term of the charterparty that the defendants should not be allowed to keep the vessel on demurrage at the specified demurrage rate for more than a reasonable time, which time, they said, expired on September 17.

The defendants denied that there was any implied term in the charterparty as alleged by the plaintiffs, and they further denied that a reasonable time was exceeded in the loading of the vessel.

On the evidence Sankey J. held that on September 17 a reasonable time for keeping the vessel on demurrage had expired.

Roche, K.C., and *R. A. Wright*, for the plaintiffs. Where, as in this case, the charterparty stipulates for a rate of demurrage, but does

not specify any particular number of days beyond the lay days to be allowed by the shipowners, the charterers are only entitled to keep the vessel on demurrage for a reasonable time: Carver's Carriage by Sea, 5th ed., s. 609. That view is supported by the Scottish case of *Lilly & Co.* v. *Stevenson & Co.* (1), where Lord Trayner said: "Where the days on demurrage are not limited by contract, they will be limited by law to what is reasonable in the circumstances, as circumstances may happen to exist or emerge." That passage was adopted by Bray J. in *Wilson & Coventry* v. *Otto Thoresen's Linie.* (2) If a reasonable time is exceeded the ship's obligation to wait for cargo is at an end—*Dimech* v. *Corlett* (3)—although in order to mitigate damages it may be reasonable for her to wait longer if there is a likelihood of the cargo coming forward. In this case a reasonable time for the steamer to wait expired on September 17, and although the plaintiffs acted reasonably in keeping her longer for her cargo, they were entitled to say and did say that they would not keep her at the demurrage rate, but would claim for the damage they actually suffered. In *Western Steamship Co.* v. *Amaral Sutherland & Co.* (4) Bray J. decided that in these circumstances the demurrage rate of compensation applies to the whole period of detention and not merely to the reasonable time, but the Court of Appeal (5), taking the view that the case could not be satisfactorily dealt with on the preliminary point of law, directed that the facts should be ascertained. The Court of Appeal accordingly discharged Bray J.'s judgment without assenting to or dissenting from it. In that condition of things the point is still open. Moreover, Bray J.'s judgment is distinguishable because in that case there was not, as there was in the present case, a notice given by the shipowners that the compensation at the demurrage rate would not be accepted after a certain date, and that damages for the loss actually suffered would be claimed. [They also cited *Ardan Steamship Co.* v. *Andrew Weir & Co.* (6)]

Leck, K.C., and *Theobald Mathew*, for the defendants. In each case the provisions of the charterparty as to demurrage must be looked at. As is stated in Scrutton on Charterparties and Bills of

(1) 22 R. 278, 286.
(2) [1910] 2 K. B. 405, 408.
(3) (1858) 12 Moo. P. C. 199, 231.
(4) [1913] 3 K. B. 366.
(5) [1914] 3 K. B. 55.
(6) [1905] A. C. 501.

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Lading, 7th ed., p. 283, stipulations for demurrage may be either exhaustive or partial, or they may be absent altogether. As an instance of an exhaustive stipulation the author cites a clause providing for " ten days for loading and demurrage at 20*l.* per diem afterwards " ; such a clause, it is said, covers all delay ; " on such a provision," it is added, " the shipowner cannot say that the provision for 20*l.* a day demurrage only applies to a reasonable time, after the lapse of which he can claim damages for detention. After the lapse of a reasonable time he may take his ship away, but if he allows her to stay on he can only claim the agreed rate of demurrage." The point is really concluded in the defendants' favour by Bray J.'s judgment in *Western Steamship Co.* v. *Amaral Sutherland & Co.* (1) Lord Trayner's observations in *Lilly & Co.* v. *Stevenson & Co.* (2) are not binding and moreover were obiter.

[SANKEY J. Is the position affected by the fact that the plaintiffs gave notice that after September 17 they would claim 200*l.* per day as damages for the detention of the vessel ?]

No. By giving that notice the plaintiffs could not affect the legal rights of the defendants under the charterparty. Moreover, the defendants at once intimated that they would insist upon their rights under the charterparty. The case of *Ardan Steamship Co.* v. *Andrew Weir & Co.* (3) cited on behalf of the plaintiffs has no bearing on this question.

R. A. Wright in reply. The statement in Scrutton on Charterparties and Bills of Lading that where after the expiration of a reasonable time the shipowners allow their ship to remain they can only claim the agreed rate of demurrage applies only where the ship is allowed to stay on without anything being said as to the terms ; it does not apply where, as in this case, the shipowners have intimated that a different rat will be charged.

SANKEY J. stated the facts and continued : I have now to consider the rights of the parties in view of my finding that a reasonable time for keeping the steamer on demurrage expired on September 17. For the plaintiffs it is said in effect that when a chartered vessel arrives at her loading port and has duly given notice of readiness

(1) [1913] 3 K. B. 366. (2) 22 R. 278, 286.
(3) [1905] A. C. 501.

three periods may have to be regarded—first, the lay days, during the currency of which no payments are due from the charterer to the shipowner; secondly, the demurrage days, which may be a fixed number of days, or the charterparty may merely provide an agreed rate of demurrage without specifying any number of days, and in the latter case all the circumstances have to be taken into account to ascertain what is a reasonable number of days for demurrage. Thirdly, if the fixed or the reasonable number of days is exceeded there has then to be ascertained the amount of that excess, and for the detention during the extra period the Court, in default of agreement between the parties, has to decide what is payable. In this case demurrage was paid at the rate of 46*l.* 15*s.* 4*d.* per day up to September 17, and no question arises as to that, but after September 17 the plaintiffs claimed to be entitled to be paid 200*l.* per day as damages for detention. On the other hand, the defendants say that in each case the Court must have regard to the charterparty, which by the clause as to demurrage may be exhaustive on the subject. A charterparty in dealing with demurrage may do one of three things: first, it may provide for a fixed number of days for demurrage. Thus, assuming that under the charterparty there are five lay days and five days for demurrage, and instead of taking ten days for loading the vessel takes eleven days, the shipowner will be entitled on the eleventh day to damages for detention. Secondly, the charterparty may provide that there shall be so many lay days and a reasonable number of demurrage days. In such a case, in default of agreement, it is for the Court to say what is a reasonable number of days, and then all days in excess of that number will be detention days. But there may be, thirdly, a charterparty which neither fixes the number of demurrage days nor provides that there shall be a reasonable number of days for demurrage, but merely says that a certain rate shall be paid for demurrage.

In this case I think the defendants' contention is correct and I have to see whether under this charterparty the parties have provided exhaustively for the question of demurrage. The material provision of the charterparty is, "Steamer to be loaded according to berth terms, with customary berth despatch, and if detained longer than five days, Sundays and holidays excepted, charterers to pay demurrage at the rate of fourpence British sterling, or its

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equivalent, per net register ton per day, or pro rata, payable day by day, provided such detention shall occur by default of charterers or their agents." This does not fix a particular number of days for demurrage; nor does it say that there shall be a reasonable number of days for demurrage, leaving it to the Court to decide what is a reasonable number of days. It appears to be exhaustive. It says that for every day the vessel is detained—I do not use this word in a technical sense—the sum of fourpence per net register ton shall be payable day by day. It seems to me that upon this point I am really concluded by the judgment of Bray J. in *Western Steamship Co.* v. *Amaral Sutherland & Co.* (1), which I think is a decision in pari materia. In giving judgment in that case Bray J. said (2): "The question of law which I have to decide in this case is substantially whether the contention in paragraph 4 of the defence is well founded, that contention being that no provision either express or implied was contained in either of the charterparties that the agreed rate of demurrage should only apply to a reasonable number of days over and above the lay days in each case"; and a little further on he said this: "In this case the steamer was detained for a considerable number of days. Under those circumstances what was to be done? The answer is, 'If longer detained consignees to pay demurrage.' There is no limitation upon those words in the document. Why then should I put any limitation upon them? The limitation which in substance Mr. Leck asks me to put is 'if rightfully detained.' I have no right to put in that word 'rightfully,' and, apart from authority, I should have no hesitation in coming to the conclusion that 'if longer detained' means if detained whether rightfully or wrongfully. So long as the steamer is in fact detained the agreed rate of demurrage is what the charterer has to pay." In this case the plaintiffs ask me to read into the charterparty a stipulation, not that fourpence per net register ton shall be paid in respect of each day over the number of lay days, but that a certain amount shall be paid for a certain number of days, and that thereafter a sum to be agreed between the parties, or in default of agreement to be fixed by the Court, of a different amount shall be paid. In my opinion the parties have in this case agreed that one and the same rate, namely, fourpence

(1) [1913] 3 K. B. 366. (2) [1913] 3 K. B. 369.

per net register ton per day, shall be paid however long the ship is detained. I do not of course mean that the ship can be detained for ever; I mean while she is detained for the purpose for which she has gone to the port—in this case to load a grain cargo. It is open to the owners to take the ship away after a reasonable time.

The case of *Western Steamship Co.* v. *Amaral Sutherland & Co.* (1), which was decided by Bray J. as a preliminary point of law, went to the Court of Appeal, and that Court, without expressing any opinion as to the correctness or otherwise of Bray J.'s judgment, considered that the facts should be gone into, and accordingly a new trial was ordered. Subsequently the parties came to terms, so there has been no decision of the Court of Appeal upon the question. I have, however, to notice two cases which were cited on behalf of the plaintiffs. The first of these is the Scottish case of *Lilly & Co.* v. *Stevenson & Co.* (2), in which this dictum of Lord Trayner's was relied upon: "Where the days on demurrage are not limited by contract, they will be limited by law to what is reasonable in the circumstances, as circumstances may happen to exist or emerge." That observation is in favour of the plaintiffs' contention, but with regard to it I may remark, first, that it was obiter, and, secondly, that, although I naturally treat everything Lord Trayner said with the greatest possible respect, I am not bound to adopt his view, nor indeed am I bound to follow the decision of Bray J. in *Western Steamship Co.* v. *Amaral Sutherland & Co.* (1) The other case to which I was referred was *Ardan Steamship Co.* v. *Andrew Weir & Co.* (3), but it seems to me to have no application to the present case. There the shipowners claimed damages for the detention of the vessel owing to delay in providing the cargo. The charterparty contained a clause excepting riots, strikes, &c., or any other accidents or causes beyond the control of the charterers which might delay her loading. The gist of the case was the charterers' neglect to supply a cargo. The House of Lords, reversing the decision of the Court of Session, held that the charterers were liable on the ground that it was their primary duty to furnish the stipulated cargo, there being nothing in the charterparty to qualify that obligation.

(1) [1913] 3 K. B. 366. (2) 22 R. 278, 286.
(3) [1905] A. C. 501.

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Finally I was referred to two text-books which, owing to their general use in the profession, may be taken as authoritative—I mean Carver's Carriage by Sea and Scrutton's Charterparties and Bills of Lading. In s. 609 of Carver it is said that "Charterparties frequently stipulate for a *rate* of demurrage, to be paid in case the ship is detained beyond the agreed or proper time, without stipulating for any particular number of extra days to be allowed by the shipowner. In such cases the true view seems to be that the charterers are entitled to keep the ship on demurrage for a reasonable time." From that passage the inference is drawn that after a reasonable time damages for detention are due, and that again is in favour of the plaintiffs' contention. On the other hand, it is said in Scrutton L.J.'s book (7th ed., p. 283): "Stipulations for demurrage may be . . . . *exhaustive:* as 'ten days for loading and demurrage at 20*l.* per diem afterwards,' which covers all delay. On such a provision the shipowner cannot say that the provision for 20*l.* a day demurrage only applies to a reasonable time, after the lapse of which he can claim damages for detention. After the lapse of a reasonable time he may take his ship away, but if he allows her to stay on he can only claim the agreed rate of demurrage." That last sentence brings me to the last point of my judgment. I thought at first it might be said that there was a fresh contract for 200*l.* to be payable day by day after September 17. I am now satisfied that there was no such contract. The plaintiffs wrote saying that they intended to insist upon their right to charge 200*l.* after September 17, but, on the other hand, the defendants said they intended to insist upon their rights under the charterparty; and in those circumstances the notice given by the plaintiffs which has been relied upon by them does not, in my opinion, advance matters. The parties must be relegated to their legal rights, and I come to the conclusion, not, however, without considerable hesitation, that I ought to decide that the defendants' contention is right.

Judgment accordingly.

Solicitors for plaintiffs: *William A. Crump & Son.*
Solicitors for defendants: *Thomas Cooper & Co.*

J. S. H.

WALDER *v.* TURNER.

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July 28.

Army—Military Service—Exemption—Person rejected since August 14, 1915—*Exercise of Power of Rejection by Recruiter—Person charged with being Absentee—Jurisdiction of one Justice of the Peace to commit to Military Custody—Summary Jurisdiction Act,* 1879 (42 *&* 43 *Vict. c.* 49), *s.* 20, *sub-s.* 9—*Army Act,* 1881 (44 *&* 45 *Vict. c.* 58), *s.* 154, *sub-ss.* 2, 3—*Military Service Act,* 1916 (5 *&* 6 *Geo.* 5, *c.* 104), *Sched. I., par.* 6—*Regulations for Recruiting,* 1912, *regs.* 102, 103.

By s. 20, sub-s. 9, of the Summary Jurisdiction Act, 1879, any case arising under any future Act which is triable by a Court of summary jurisdiction shall, unless it is "otherwise prescribed," be determined by a Court of summary jurisdiction consisting of two or more justices.

By s. 154, sub-ss. 2 and 3, of the Army Act, 1881, a Court of summary jurisdiction may deal with a person charged with being a deserter as if he were charged with an indictable offence; and if satisfied that he is a deserter shall forthwith cause him to be delivered into military custody.

By par. 6 of the First Schedule to the Military Service Act, 1916, men who have offered themselves for enlistment and been rejected since August 14, 1915, are excepted from liability to military service under the Act.

By regs. 102 and 103 of the Regulations for Recruiting, 1912 (with amendments to August 31, 1914), when a man desires to enlist, the recruiter (in the absence of a recruiting officer) is to inspect the man and as far as possible satisfy himself that there is no cause that would render him undesirable as a recruit.

On November 25, 1915, the appellant offered himself as a recruit, at the same time informing the recruiter that he had been rejected on September 4, 1914. The recruiter, after referring to his records, wrote on the appropriate form "not accepted," signed the form, and handed it to the appellant:—

Held, that, as the recruiter made no kind of examination, he had not exercised the authority vested in him under reg. 102; that the appellant was therefore not validly rejected and was not within the exception from military service contained in par. 6 of the First Schedule to the Military Service Act, 1916.

On April 5, 1916, the appellant was arrested by direction of the military authorities and charged before a justice of the peace with being an absentee from His Majesty's Forces, and the justice remanded him in custody to be dealt with by the military authorities without imposing any penalty:—

Held, that, assuming the case was one arising under a future Act within the meaning of s. 20, sub-s. 9, of the Summary Jurisdiction

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Act, 1879, it was within the words "otherwise prescribed" contained in the sub-section, and could therefore be dealt with by one justice of the peace, inasmuch as under s. 154, sub-s. 2, of the Army Act, 1881, a Court of summary jurisdiction could deal with the appellant as if he were charged with an indictable offence, and the justice could therefore commit him to military custody in the same way as he could have committed him for trial if he had been charged with an indictable offence.

CASE stated by a justice for the county of Sussex.

On April 5, 1915, the appellant was charged before the justice with being an absentee from His Majesty's Regular Forces, and the justice remanded the appellant in custody to be dealt with by the military authorities without imposing any penalty.

Upon the hearing of the charge the following facts were admitted or proved :—The appellant had not on March 2, 1916, been attested as a member of His Majesty's Naval, Regular, or Territorial Forces. On September 4, 1914, the appellant offered himself at the recruiting office, Hayward's Heath, for the purpose of being attested, and was rejected after medical examination on the ground of defective eyesight. On November 25, 1915, the appellant attended at the recruiting office at Hayward's Heath for the purpose of again offering himself as a recruit, but on informing the recruiting sergeant that he had been previously rejected on September 4, 1914, the recruiting sergeant, after referring to his records, filled in Army Form B. 2505A with the date November 25, 1915, the name of the appellant, and the name of the recruiting office. He then wrote on the form the words "not accepted at Hayward's Heath," signed the form at the foot thereof, and handed it to the appellant. The appellant was not on the last-mentioned occasion medically examined. On February 22, 1916, the appellant received notice to report himself for service at the Town Hall, Brighton, on March 8, 1916. On February 29, 1916, he attended at the Town Hall, Brighton, and produced to the recruiting officer there the Army Form B. 2505A indorsed as stated above. Correspondence then took place between the appellant and the recruiting officer at Brighton, the effect of which was that the appellant contended that, having been rejected since August 14, 1915, he was not liable to military service, and the recruiting officer requested him to

forward his rejection certificate for perusal. On March 8, 1916, a further notice (Army Form W. 3236) was sent to him at his proper address calling upon him to present himself at the Town Hall, Brighton, on March 10, 1916. On March 30, 1916, he again went to the recruiting office at Brighton and again produced his rejection certificate to the recruiting officer for inspection. On April 5, 1916, the appellant was by direction of the military authorities arrested as an absentee.

It was contended on behalf of the appellant that the indorsement of his Army Form B. 2505A by the recruiting sergeant on November 25, 1915, was a rejection, and that therefore he was a man who had offered himself for enlistment and been rejected since August 14, 1915, and came within the exceptions mentioned in paragraph 6 of the First Schedule of the Military Service Act, 1916 (1), and was exempt from military service under that statute.

The justice decided as a matter of law that the recruiting sergeant had no power or authority to reject a man offering himself for attestation; his duty, according to s. 80 of the Army Act, 1881 (2), being to give to every person offering to enlist a notice directing him to attend before a justice of the peace to be attested, and therefore

(1) Military Service Act, 1916 (5 & 6 Geo. 5, c. 104), s. 1, sub-s. 1: "Every male British subject who—

"(*a*) on the fifteenth day of August nineteen hundred and fifteen, was ordinarily resident in Great Britain, and had attained the age of eighteen years and had not attained the age of forty-one years; and

"(*b*) on the second day of November, nineteen hundred and fifteen, was unmarried and was a widower without any child dependent on him;

shall, unless he . . . . is within the exception set out in the First Schedule to this Act . . . . be deemed as from the appointed date to have been duly enlisted in His Majesty's regular forces for general service with the colours or in the reserve for the period of the war, and to have been forthwith transferred to the reserve."

By paragraph 6 in the First Schedule to the Act, "Men who . . . . have offered themselves for enlistment and been rejected since the fourteenth day of August nineteen hundred and fifteen" are within the exceptions set out in the schedule.

(2) Army Act, 1881 (44 & 45 Vict. c. 58), s. 80, sub-s. 1: "Every person authorised to enlist recruits in the regular forces (in this Act referred to as the 'recruiter') shall give to every person offering to enlist a notice

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there had been no rejection of the appellant since August 14, 1915, within the meaning of the Military Service Act, 1916, and the appellant was not exempt from military service, and the justice ordered him to be delivered into military custody without imposing a fine, but telling him that he must bring before the military officials any excuse or explanation that he had to offer.

No question of jurisdiction was raised by the appellant's solicitor when the case was before the justice, but the appellant subsequently contended that one justice had no power to deal with the case. The justice submitted that he had the power.

The questions for the opinion of the Court were: (1.) Whether upon the above statement of facts the justice came to a correct determination in point of law in ordering the appellant to be delivered into military custody. If so, the order made by him was to stand subject to the opinion of the Court on the second question hereinafter stated. If not, the justice expressed the opinion that the appellant was entitled to be discharged from service under the Military Service Act, 1916, subject to his liability to be called up for medical examination before September 1, 1916, under s. 3, sub-s. 2, of the Military Service Act, 1916 (session 2) (6 & 7 Geo. 5. c. 15). (2.) Whether the justice had power to deal with the case. If so,

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in the form for the time being authorised by a Secretary of State, stating the general requirements of attestation and the general conditions of the contract to be entered into by the recruit, and directing such person to appear before a justice of the peace at the time and place therein mentioned."

Sect. 154: "With respect to deserters the following provisions shall have effect:

"(1.) Upon reasonable suspicion that a person is a deserter, it shall be lawful for . . . . any officer or soldier, or other person, to apprehend such suspected person, and forthwith to bring him before a Court of summary jurisdiction:

"(2.) Where a person is brought before a Court of summary jurisdiction charged with being a deserter under this Act, such Court may deal with the case in like manner as if such person were brought before the Court charged with an indictable offence . . . .:

"(3.) The Court if satisfied . . . . that he is a deserter, shall forthwith . . . . cause him . . . . to be delivered into military custody in such manner as the Court may deem most expedient . . . ."

then, subject to the opinion of the Court on the first question, his order was to stand. If not, the justice expressed the opinion that the appellant was entitled to a rehearing of the charge before two justices.

D. N. Pritt, for the appellant. The justice relied solely on s. 80 of the Army Act, 1881, whereas he ought also to have considered the Regulations for Recruiting made under ss. 93 and 94 of the Army Act, 1881, and the Reserve Forces Acts, 1882 to 1907. (1) The

(1) Regulations for Recruiting for the Regular Army and the Special Reserve, 1912 (reprinted with amendments to August 31, 1914), made under ss. 93 and 94 of the Army Act, 1881, and the Reserve Forces Acts, 1882 to 1907: Regulation 56: "A man will not be selected as a recruiter unless he is in every respect qualified. Before a recruiter is sent on recruiting duty the officer I/C the recruiting area must be satisfied that the following conditions are fulfilled:—

. . . . . .

"(ii.) That he has been sufficiently instructed to enable him easily to detect such physical disqualifications, or signs of disease in those seeking to enlist, as will tend to diminish the number of rejections by medical officers . . . ."

Regulation 99: "Recruiting will be conducted openly, and enlistments will be carried out in accordance with the provisions of sec. 80, Army Act . . . ."

Regulation 101: "When a man desires to enlist, the recruiter will ask him if he has already received a notice paper. Should the man answer in the negative the recruiter, if in his opinion the man is of an age and stamp suitable for the arm of the service he has preference for, and has no apparent physical disability, will fill up and give him one on the prescribed form . . . ."

Regulation 102: "The recruiter will then take the man before the recruiting officer, who will carry out the following instructions:—

"(i.) He will inspect the man, and, as far as possible, satisfy himself that there is no cause that would render him undesirable as a recruit.

"(ii.) He will put a few questions to him to ascertain that he is not deficient in intelligence . . . .

"(iii.) If the man is considered unfit he will be at once rejected."

Regulation 103: "If there is no recruiting officer at the station the recruiter will carry out these instructions . . . ."

Regulation 104: "If the man is found fit on primary examination, he will be asked the questions laid down in the notice paper, and his medical examination will then be proceeded with. Every man will be measured but will not be sent up for medical examination unless it is reasonable to suppose that he will pass the same. . . . ."

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appellant having offered himself for enlistment and been rejected since August 14, 1915, was under paragraph 6 of the First Schedule to the Military Service Act, 1916, exempt from military service.

One justice sitting alone had no jurisdiction to order the appellant to be delivered into military custody. By s. 20, sub-s. 9, of the Summary Jurisdiction Act, 1879 (1), any case other than an indictable offence triable summarily, and any case arising under any future Act which is triable by a Court of summary jurisdiction, must, unless otherwise prescribed, be heard by at least two justices. The present case arose under a statute passed subsequently to the Act of 1879, and it was other than an indictable offence. Before causing him to be delivered into military custody the justices must come to a definite conclusion that the person charged is a deserter—that is, it must decide before it can do anything that he has committed a criminal offence under ss. 12 and 15 of the Army Act, 1881. He was treated as a person who by virtue of s. 1, sub-s. 1, of the Military Service Act, 1916, was deemed to have been duly enlisted and transferred to the reserve.

One justice is a Court of summary jurisdiction, but the effect of s. 20, sub-s. 9, of the Summary Jurisdiction Act, 1879, is that the Court of summary jurisdiction dealing with an absentee must consist of two justices. In dealing with an indictable offence one justice can commit for trial, but by s. 17 of the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), he must take depositions. None were taken in the present case. [The definition of Court of summary jurisdiction in s. 13, sub-s. 11, of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), was also referred to.]

Sir G. Cave, S.-G., and *G. A. H. Branson*, for the respondent. The word "rejected" in paragraph 6 of the First Schedule of the Military Service Act, 1916, means rejected by the proper authority. Although a recruiting officer, or in his absence a recruiting sergeant, may

(1) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 20, sub-s. 9: "Any case arising under this Act, other than such indictable offence as aforesaid," (i.e., an indictable offence dealt with summarily in pursuance of the Act) "and any case arising under any future Act which is triable by a Court of summary jurisdiction, shall, unless it is otherwise prescribed, be heard tried determined and adjudged by a Court of summary jurisdiction consisting of two or more justices."

reject a man obviously physically or mentally unfit, they cannot do so if there is a question of health or eyesight to be gone into. In the present case the recruiting sergeant did not reject at sight for an obvious defect. He examined the records and found that the appellant had been previously rejected. He accepted the old certificate as sufficient and, relying upon it, rejected the appellant. In so doing he acted outside his powers. The defect for which the recruiter can reject must be something on which he acts at sight, e.g., the loss of a leg or an eye. The duties of the recruiter are set out in regulations 101, 102, 103, and 104 of the Regulations for Recruiting, and under those regulations it is the duty of the recruiter to exercise his judgment before he rejects a man. In the present case the sergeant obviously made a mistake, as he thought he was bound by the result of the previous examination.

One justice had jurisdiction to commit the appellant into military custody. Sect. 20, sub-s. 9, of the Summary Jurisdiction Act, 1889, has to be applied to s. 154, sub-s. 1, of the Army Act, 1881. Sub-s. 2 of that section means that the Court of summary jurisdiction is not to convict the person charged, but is to deal with him in a similar manner to that which would apply if he were charged with an indictable offence, i.e., remit him to military custody. It is therefore quite reasonable that the justice should deal with the case as he would do if he were going to commit a person charged for trial. There is no power in any civil Court to sentence a man for desertion. It is true that if a Court of summary jurisdiction convicted a man under s. 15 of the Reserve Forces Act, 1882, of an offence against that section, the Court would have to consist of two justices, but in the present case the justice was acting under s. 154 of the Army Act, 1881. The definition of "Court of summary jurisdiction" in the Interpretation Act, 1889, is colourless. [Sub-s. 6 of s. 154 of the Army Act, 1881, was also referred to.]

Pritt in reply. The recruiting sergeant was the proper authority to reject the appellant. When he found from the records that the appellant was of very defective eyesight it was open to him to come to the conclusion that it would be unreasonable to expect him to pass the medical examination. Regulation 56 shows that recruiters are carefully chosen and are competent men.

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The judgment of the COURT (Lord Reading C.J., Avory and Low JJ.) was delivered by

AVORY J. At the request of the Lord Chief Justice I am about to deliver the judgment of the Court. The substantial question is whether the appellant comes within the terms of the exception contained in paragraph 6 of the First Schedule to the Military Service Act, 1916, as being a person who has been rejected for service since August 14, 1915. The justice states in the case that he decided as a matter of law that the recruiting sergeant had no power to reject a man offering himself for attestation, his duty, according to s. 80 of the Army Act, 1881, being merely to give the man notice to attend before the justice.

We think that the justice was wrong in holding that the recruiting sergeant had no power to reject a man in any circumstances. It is clear that there may be circumstances in which the recruiting sergeant may reject a man. The question is whether those circumstances existed in the present case, and whether the recruiting sergeant exercised his power of rejection in accordance with the anthority vested in him, particularly having regard to regulation 102 of the Regulations for Recruiting, 1912 (reprinted with amendments to August 31, 1914). It is clear from the case stated that on November 25, 1915, the appellant attended at the recruiting office "for the purpose of again offering himself as a recruit, but on informing the recruiting sergeant that he had been previously rejected on September 4, 1914, the recruiting sergeant, after referring to his records, filled in Army Form B. 2505A with" certain particulars, wrote on the form the words "not accepted at Hayward's Heath," signed the form at the foot, and handed it to the appellant.

We are bound to assume from that statement of fact that that was all the recruiting sergeant did. There is no evidence that he made any kind of examination under regulation 102. He acted on the fact that there had been a previous rejection in September, 1914. In these circumstances we come to the conclusion that the recruiting sergeant did not in fact reject the appellant under any provision in regulation 102, and that therefore the appellant was not validly rejected.

Another point was taken on behalf of the appellant by Mr. Pritt

in the nature of a preliminary objection to the justice's power to deal with the appellant. He contended that where a man is taken before a Court of summary jurisdiction as an absentee and is by the Court, on proof that he is an absentee, handed over to military custody, the Court of summary jurisdiction dealing with the matter must consist of two justices. He relied on s. 20, sub-s. 9, of the Summary Jurisdiction Act, 1879, which enacts that any case arising under "any future Act which is triable by a Court of summary jurisdiction, shall, unless it is otherwise prescribed," be heard by a Court of summary jurisdiction consisting of two or more justices.

It is not necessary to decide whether the proceedings against the appellant can properly be described as a case arising under a future Act within the meaning of the sub-section. We will assume that they can, but the question is whether it is "otherwise prescribed" with regard to this case, namely, by the Army Act, 1881, s. 154, which provides by sub-s. 2 that the Court of summary jurisdiction may deal with a person charged with being a deserter as if he were charged with an indictable offence. The justice clearly acted under the powers conferred by that section when he made the order for the delivery of the appellant into military custody. The meaning of the sub-section is that the Court may in such a case deal with the matter as if the accused were charged with an indictable offence. In that case the Court would commit a prisoner for trial if there were prima facie evidence that he had committed the offence with which he was charged, and it is clear that in that case the Court may consist of one justice only. We therefore come to the conclusion that a Court dealing with a deserter under s. 154 of the Army Act, 1881, may consist of one justice only. A different question would arise if under s. 15, sub-s. 2, of the Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), any proceedings were taken against a deserter for the purpose of making him liable to fine or imprisonment. In that case the Court must consist of two justices. Upon these grounds we are of opinion that the appeal fails.

Appeal dismissed.

Solicitors for appellant: *Satchell, Chapple & Son, for L. J. Wyatt, Hayward's Heath.*

Solicitor for respondent: *Treasury Solicitor.*

J. E. A.

K. B. D. 1916
March 6; *July* 24, 25.
C. A.
Oct. 27.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

In re HILCKES.

Ex parte MUHESA RUBBER PLANTATIONS, LIMITED.

Bankruptcy—Company registered in England—British Directors—Alien Enemy Shareholders—Commercial Agent in Enemy Country—Carrying on Business in Enemy Country—Enemy Company—Right of Proof.

In 1910 a company was incorporated in England to acquire from the debtor, a German subject resident in England, a rubber estate in a German colony. The estate was transferred to and registered in the colony in the names of trustees for the company, and the debtor was appointed the commercial agent of the company in the colony. The registered offices of the company were in London. All the directors and the secretary were English, as also were the majority of the shareholders; but a considerable number of shares were held by Germans. In 1911 the company dismissed the debtor on the ground of alleged defalcation. He then commenced an action in the High Court in Berlin against the company and the trustees to recover possession of the estate. This action was dismissed with costs, which were fixed at a sum which was equivalent to 398*l.* in English money. In 1913 the company sued the debtor in the King's Bench Division to recover that amount. This action was pending in August, 1914, when war was declared between Great Britain and Germany, and the debtor was interned in this country as an alien enemy and was subsequently adjudicated a bankrupt. The company claimed to prove in his bankruptcy for 398*l.* Horridge J. disallowed the proof on the ground that the company was carrying on business in an enemy country and must therefore, according to the sixth proposition of Lord Parker's summary of the law in *Daimler Co.* v. *Continental Tyre and Rubber Co.* [1916] 2 A. C. 307, 346, be regarded as an alien enemy:—

Held by the Court of Appeal, that the mere fact that a British company did business in an enemy country through a properly appointed agent there did not constitute it an enemy company; that the company was not an alien enemy, and was therefore entitled to prove.

Decision of Horridge J. reversed.

In 1910 the above-named company was incorporated in England with a capital of 135,000*l.*, afterwards increased to 155,000*l.*,

divided into shares of 1*l.* each. Its principal object was to acquire and develop the Muhesa Rubber Estate in German East Africa, of which the debtor was the owner. There being a difficulty in German law as to the registration of the estate in the name of an English company, it was conveyed to and registered in the names of R. W. Elder (the solicitor of the company) and a Dr. Kownatzki as trustees for the company; and the debtor, who was a German subject, was appointed the commercial agent of the company at Tanga in German East Africa.

In 1911 the company ascertained that the debtor had not accounted for considerable sums representing the proceeds of sale of rubber from the company's estate, and they dismissed him from their employ. He then brought an action against the company and the trustees in the High Court of Berlin to recover possession of the estate, but his action was dismissed with costs, and an appeal by him to the Supreme Court at Berlin was also dismissed with costs. The total of the taxed costs to be paid by the debtor to the company and the trustees was fixed by the judgment of the Berlin Court at 8161 marks, equivalent to 393*l.* 1*s.* 11*d.* British.

At the outbreak of the war in August, 1914, the debtor, being in England, was interned as an alien enemy. In September, 1914, a receiving order was made against him, and adjudication followed. In January, 1916, the company by its secretary, duly authorized in that behalf, and R. W. Elder (Dr. Kownatzki having died) lodged a joint proof against the debtor's estate for the 393*l.* 1*s.* 11*d.* based on the judgment of the Berlin Court, which the trustee in bankruptcy rejected on the ground (1.) that the judgment was a judgment of a German Court, and (2.) that the company, though registered as an English company, was in reality a German trading concern composed almost entirely of persons of German nationality. On March 6 an appeal by the company against the trustee's rejection of the proof came before the Court and was directed to stand over pending the judgment of the House of Lords in *Daimler Co.* v. *Continental Tyre and Rubber Co.*, which was delivered on June 30. (1) The company's appeal now came on again for hearing.

It appeared that the secretary and directors of the company were British subjects, and that there were 540 shareholders who held

(1) [1916] 2 A. C. 307.

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between them 129,500 shares: 320 of these shares were bearer shares and the holders could not be traced; 13,140 shares were held by fifty-five persons resident in Germany; 26,355 shares were held by persons resident in Austria, Hungary, Turkey, France, Belgium, and Holland; and the remaining 89,685 shares were held by 387 shareholders resident in England, some of whom were Germans.

Clayton, K.C., and *F. Mellor*, for the company. As to the first objection, the judgment of a foreign Court can be enforced in this country: Taylor on Evidence, 10th ed., s. 10. On the main question, the *Daimler Case* (1) is clearly distinguishable from this case. There the entire control of the company was in the hands of a German directorate, and the predominant character of its shareholders was German. Here all the directors are British subjects, and the majority of the shareholders who have the voting power are resident in England.

Colam, K.C., and *Bell Hart*, for the trustee. There is no evidence of the nationality of the shareholders in England, and the names of some of them are clearly German. It is true that the directors are British subjects, but the whole of the company's property is in an enemy country and the business of the company is carried on there. The company has its commercial domicil in an enemy country, although it is registered in England, and all its interests are inimical to this country. It is submitted that the company comes within the sixth proposition stated by Lord Parker in the *Daimler Case*. (2)

Clayton, K.C., in reply. There is nothing in the evidence to show that the company is an enemy company. The fact that the company's property is situate abroad is not conclusive. The true test is in whom is the control of the company vested? Here the control of the company's business is in the British directors and the majority of the shareholders who are resident in England and in neutral countries. Even if the name of the company is struck out of the proof it can be maintained by Mr. Elder, who is a British subject.

July 25. HORRIDGE J. This is an appeal to reverse the decision of the trustee rejecting a proof which was made by Frederick Arthur

(1) [1916] 2 A. C. 307. (2) [1916] 2 A. C. 307, 346.

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Bagnall, the acting secretary of the Muhesa Rubber Plantations, Limited, and Robert William Elder against the estate of one Hilckes. The proof is in respect of certain orders of the German Courts directing the bankrupt to pay to the company and Mr. Elder certain costs incurred by them in defending proceedings by the bankrupt in Germany. The proof is worded as follows: "And we the said Frederick Arthur Bagnall and Robert William Elder further jointly say that the said H. Hilckes was at the date of the receiving order, viz., 11th of September, 1914, and still is justly and truly indebted to Muhesa Rubber Plantations, Limited, (whose registered office is situate at 2, Austin Friars in the city of London) and to me the said Robert William Elder jointly in the sum of 393*l.* 1*s.* 11*d.*, being the amount of certain costs." That is a joint proof by the company and Mr. Elder in respect of those costs which were ordered to be paid to them under the judgment. On behalf of the trustee it is said that the company is an enemy company, and therefore if the proof were by that company alone I ought not to allow it. In answer to that Mr. Clayton says: "Even assuming that to be true, it is a joint proof, and on that account Mr. Elder would be entitled to prove even though the company were not so entitled." I do not think that is sound. In the first place, the proof is sent in as a joint proof, and therefore the trustee would require the receipt of both persons. Even assuming that the company could be struck out if they are an enemy corporation, then the proof by Elder might entirely, and to some extent at any rate must, benefit the enemy company by relieving them entirely, by the proof being paid in full or to the extent to which dividends upon it were paid, from their liability to pay their solicitors the costs for which they were liable as between solicitor and client. It is quite clear to my mind that, if the company is an enemy company, to admit the proof would be to benefit the enemy.

Now is the Muhesa Rubber Plantations, Limited, an enemy company? The proposition of law which is said to govern this case is to be found in the case of *Daimler Co.* v. *Continental Tyre and Rubber Co.* in the House of Lords. (1) That proposition is stated by Lord Parker, and his judgment was concurred in and approved

(1) [1916] 2 A. C. 307, 346.

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of by Lord Mersey, Lord Sumner, and Lord Kinnear. Further, I think the proposition he stated is not one as to which there was any divergence of opinion in the House of Lords. He merely stated a proposition which he says is clearly law. The proposition is No. 6: "A company registered in the United Kingdom but carrying on business in an enemy country is to be regarded as an enemy." Now this company is registered in the United Kingdom, but does it carry on business in an enemy country? Turning to the joint affidavit of the company and Mr. Elder, it says: "The company was incorporated"—what for?—"for the purpose of acquiring certain freehold and leasehold properties situate in German East Africa known as the Muhesa Estate. The vendors to the company were the Rubber Produce Agency, Limited, who had contracted to purchase from the bankrupt his interest in the said properties. After the incorporation of the company it was ascertained that by German law properties under the jurisdiction of the German Empire could not be registered in the name of an English company without the consent of the German Emperor, and it was therefore agreed that the freehold and leasehold properties forming the Muhesa Estate should be transferred to and registered in the name of me the said Robert William Elder and one Dr. Kownatzki as trustees for the company, and accordingly on the 16th of April, 1910, the bankrupt by a notarial act executed by him in Berlin transferred his interest in the properties to me the said Robert William Elder and the said Dr. Kownatzki as such trustees as aforesaid. The bankrupt or his firm of Hilckes & Co. (of which he was the sole partner) were on or about the 31st of May, 1910, appointed to act and did act as the commercial agents of the company at Tanga, German East Africa, for the purpose of dealing with all shipments of rubber from the Muhesa Estate." Therefore the position was this, that the company was formed expressly for the purpose of dealing with this rubber estate in German East Africa, and not only to have the estate as a property, but to use it for the purpose of rubber production, as appears by the appointment of the bankrupt as the agent of the company in German East Africa to ship the rubber. Under those circumstances I cannot imagine a company of whom it could be more truly said that they both traded in and had in fact a commercial domicil in a German colony.

For these reasons I think the Court cannot assist them in their appeal against the rejection of their proof. The motion must be dismissed with costs.

H. L. F.

From this decision the company and Elder appealed.

Oct. 27. *Clayton*, *K.C.*, and *F. Mellor*, for the appellants. Horridge J. has misapprehended the effect of the *Daimler Case*. (1) That was decided by the House of Lords on the ground that the secretary of the company had no authority to bring the action. This is not an enemy company. It is an English company carrying on its business in the city of London. All its directors and the secretary are British subjects and two-thirds of its shareholders are purely English. The real business of the company is carried on where the central management and control actually abide, that is in London : *De Beers Consolidated Mines, Ld.* v. *Howe* (2) ; *Mitchell* v. *Egyptian Hotels, Ld.* (3)

[SCRUTTON L.J. If this were a German company, would the trustee be justified in rejecting the proof altogether ? Ought he not to make provision for it, the right to recover the debt being only suspended ?]

Yes.

[LORD COZENS-HARDY M.R. referred to *Porter* v. *Freudenberg* (4) and *Ex parte Boussmaker*. (5)]

Colam, *K.C.*, and *Bell Hart*, for the respondent, the trustee in bankruptcy. Horridge J. has rightly decided on the evidence that this company, though registered and controlled in England, was in fact carrying on a business of enemy character. The property of the company was in enemy territory and was being exploited there. Its real business was to work a rubber estate in enemy country. The proof was rightly rejected.

LORD COZENS-HARDY M.R. This is an appeal from a refusal by Horridge J. to allow a proof by the present appellants. The

(1) [1916] 2 A. C. 307.
(2) [1906] A. C. 455.
(3) [1915] A. C. 1022.
(4) [1915] 1 K. B. 857, 873.
(5) (1806) 13 Ves. 71.

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appellants were engaged in litigation in Germany, the bankrupt being plaintiff and the company and Mr. Elder, who is a trustee for the company, being the defendants. The matter in dispute between the bankrupt and those defendants in Germany was litigated up to the final Court in that country. In each Court the plaintiff failed, and the ultimate result was that there was a judgment for payment by the bankrupt to the defendants of their costs of the litigation. Those costs were taxed and assessed by the proper tribunal in marks. The appellants then sought to prove in the bankruptcy. The trustee objected to the proof and served a notice of objection. The only ground suggested which is at all worthy of discussion is this : It is said that the company and Mr. Elder cannot sue at all, that the company is an alien enemy, and, that being so, the two plaintiffs cannot be severed and the claim must altogether fail—or at least it must fail as a claim in praesenti and the matter must stand over until after the conclusion of the war. It is attempted to support that contention by reading one passage from the judgment of Lord Parker in the *Daimler Case* (1) in the House of Lords, in which many of the learned Lords concurred, to the effect that " a company registered in the United Kingdom but carrying on business in an enemy country is to be regarded as an enemy." What is this company ? It is a company that is registered in England. That alone makes it prima facie an English company, but it is by no means conclusive. We must look behind that and see who has the control of the company. The directors are all English; the meetings are held in London ; the secretary is English. What has sometimes been called the brain and the heart of the company, the management and control of it, is beyond all doubt in London, exercised by an English board of directors. Then what about the shareholders ? Speaking for myself, I do not think in a case like this that that is material, but looking at the list of shareholders, what do we find ? There is a large majority of English shareholders, even giving the alien enemy credit—a credit to which it is not really entitled—for the whole of the shares held in foreign countries. In some of those foreign countries the shares are held by neutrals and not by alien enemies ; but even giving the enemy credit for all those shares, there is still a large majority of English shareholders. That being so, is it possible to say that this

(1) [1916] 2 A. C. 307, 346.

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is an enemy company and is not entitled to sue at the present moment at all ? In my opinion it plainly is not an enemy company.

I have read and considered, not for the first time, the very important judgments in the *Daimler Case* (1), and, without saying that there is absolute unanimity on the part of the learned Lords in the reasons they assign, I think that the majority of the learned Lords undoubtedly took the view that the doctrine which has been applied for many years by this Court and also by the House of Lords in revenue cases ought to be applied to a case of this kind, and that the judgment in *De Beers Consolidated Mines, Ld.* v. *Howe* (2) applies to a case of this kind. Lord Parker in his very learned judgment lays down certain propositions. He says (3) : " Such a company can only act through agents properly authorized, and so long as it is carrying on business in this country through agents so authorized and residing in this or a friendly country it is prima facie to be regarded as a friend, and all His Majesty's lieges may deal with it as such." Then he says if such a company's agents are adhering to the enemy or taking instructions from or acting under the control of enemies different considerations may arise. Agents may in such a case be liable, not on the ground that this is a foreign company, but that, being an English company, it is trading with the enemy and such contracts cannot be given effect to. He then says that the register of shareholders cannot be wholly disregarded in a case like that before him. But in a case like this the number of shareholders and their character seem to meto have no relevance with regard to the respondents. Then he says : " In a similar way a company registered in the United Kingdom, but carrying on business in a neutral country through agents properly authorized and resident here or in the neutral country, is prima facie to be regarded as a friend, but may, through its agents or persons in de facto control of its affairs, assume an enemy character." Then comes proposition No. 6, which was relied upon in the argument before us as the essence of the whole judgment : " A company registered in the United Kingdom but carrying on business in an enemy country is to be regarded as an enemy." If that means that a company which in all other respects is English but which happens to have a commercial agent doing

(1) [1916] 2 A. C. 307, 346. (2) [1906] A. C. 455.
(3) [1916] 2 A. C. 345, 346.

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business in an enemy country is thereby constituted an enemy company, it seems to me quite inconsistent with every one of the reasons which Lord Parker, not to mention the other learned Lords, gave. I have no doubt that this is not an enemy company, but that it is an English company, a company which, like any Englishman, may with reference to particular contracts and particular acts render itself liable to the provisions of the Proclamations or to the provisions of the common law in such cases; but that does not turn it into an enemy company any more than an imprudent act of that nature by an admitted Englishman would make him an alien enemy. Then it is said that the only business of the company is to work and develop and carry on rubber plantations which are situate in German East Africa. In the first place, there is no proof that that is their only business. When you look, as we are entitled to look,—and indeed it is necessary for this purpose to do so—at the memorandum and articles of association, it is quite clear that that is not the only business which the company is entitled to carry on. I should hesitate once or even twice before I held that the mere fact that an English company was doing business in an enemy country up to the outbreak of war and had a commercial agent there made it an alien enemy. The fact that there are a number of companies—many of them foreign companies no doubt—which have commercial agents in countries in all parts of the world where they do business renders, I think, such a contention quite untenable. Is every English company which has a commercial agent in Germany or Austria or Turkey by that one circumstance constituted an enemy company and incapable of suing? I think the answer to that proposition is too plain to require much elaboration, and with the greatest possible respect to the learned judge I have no doubt that he was wrong in the view which he took. I think, therefore, that this claim ought to be admitted.

In the view that I take it is not necessary to say anything about *Boussmaker's Case* (1), or what would have been the result if I had taken a different view. I think the appeal must be allowed.

WARRINGTON L.J. I am of the same opinion. The only question we have to determine is whether the company, one of the joint

(1) 13 Ves. 71.

creditors preferring the proof against the estate of the bankrupt, is an alien enemy within the meaning of the rule which prohibits a person bearing that character from instituting or carrying on proceedings in the Courts of this country during the continuance of the war, and I cannot help thinking that a good deal of the trouble which has arisen has been caused by confusing that question with one of a totally different character, namely, whether a person resident in this country, and therefore not an alien enemy within the rule that I have mentioned, is carrying on business in an enemy country and therefore infringing the rules of the common law against trading with the enemy, which is another question altogether. The only question, as I have said, which we have to determine is whether this company is an alien enemy—that is to say, is the company resident in this country or is it a company resident in an enemy country ? Now the company in this case is registered in England, its registered office, the place where it transacts its business, is in the city of London, and the directors are all Englishmen. A small minority of its shareholders are alien enemies ; the rest are either British subjects or neutrals. On these facts it seems to me clear beyond dispute that the company must, in accordance with the principles enunciated by Lord Parker in the *Daimler Case* (1), be treated as a company having its residence in this country, the place where its affairs are controlled, just in the same way as a natural person physically resident in this country is to be treated as so resident for the purposes of the rules regulating the decision of questions as to whether a person is an alien enemy or not. I think, therefore, it is quite clear on the facts which I have stated that this company has not obtained an enemy character. I put it in that way because, being registered in this country, it is prima facie to be treated as a British subject, and would not be treated as an alien enemy unless it could be shown that there were some facts which within the principles enunciated by Lord Parker would show that it had really obtained an enemy character. There is one thing on which the learned judge has founded his judgment, and which I have not yet referred to, but which I must notice. The property of the company, that which produces its profits or causes it to incur losses as the case may be, is a rubber plantation situate in German East Africa and therefore in enemy territory, and

(1) [1916] 2 A. C. 307.

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it is said that prior to the outbreak of war this company had an agent whose business it was, no doubt under the control of the directors here in London, to see to the cultivation and management of that estate and to provide for the export of the produce. It is said, therefore, that this company was carrying on business in an enemy country. In my opinion that question is really irrelevant to the question which we have to decide. A person physically resident in this country may be possessed of property in the enemy country, and it may be that the cultivation and management of that property may really constitute the business which he is carrying on. But that does not make him an alien enemy, nor does it make the company which is otherwise shown to be resident in this country assume an enemy character. It may be that the natural person or the company may bring itself within the rules against trading with the enemy. That is another matter altogether, and, as I have said, I think that a good deal of confusion—if I may say it with all respect—has arisen in the mind of the learned judge through not distinguishing between the two questions which seem to me to be quite distinct, namely, whether a person is an alien enemy and whether a person not an alien enemy is trading with the enemy. I agree that the appeal ought to be allowed.

SCRUTTON L.J. As we are differing from the learned judge below, I think it right to express the conclusion at which I have arrived in my own words. Mr. Hilckes, the bankrupt, and the Muhesa Company, the appellants, before the outbreak of the war were engaged in a very vigorous career of litigation in various countries. One of the incidents in the campaign was an action by Mr. Hilckes in the German Courts in which he failed and was ordered to pay a certain sum for costs. When the war broke out Mr. Hilckes was interned as a German in this country, and on his becoming a bankrupt the Muhesa Company put in a proof for the costs which Mr. Hilckes had become liable to pay by the order of the German Court. The trustee rejected the proof on certain grounds which it is agreed are not material, and also on this ground, that the Muhesa Rubber Plantations, Limited, though registered as an English company, is in reality a German trading concern composed almost entirely of persons of German nationality. That contention of the

trustee is obviously based upon a supposed fact as to the constitution of the company, and the first objection to the view taken by him is that it is not the fact, for the majority of the shareholders are not persons of German nationality, but are British subjects, and the directors are British. When the matter was before the learned judge apparently the argument on this point was postponed until after the decision of the House of Lords in the *Daimler Case* (1), and when it was resumed after the decision in the *Daimler Case* (1) the learned judge affirmed the rejection of the proof, not on the ground stated by the trustee, but on the ground that the Muhesa Company was carrying on business in an enemy country and therefore was to be regarded as an enemy within the sixth proposition stated in the judgment of Lord Parker. The first difficulty that I experience in agreeing with the learned judge is that I can find no evidence whatever that the Muhesa Company is carrying on business in an enemy country. The only matter that the learned judge cites is that before the outbreak of war the company had a commercial agent on their property in German East Africa. That is perfectly true, but there is no evidence whatever as to what happened on the outbreak of war. It appears that the manager is interned in England, and it is not shown that anybody is carrying on any business on the rubber plantation, which I think, from the place where it is stated to be, is now and has for some little time been in the possession of the British. I can find no evidence whatever of anything except that the Muhesa Rubber Company, prima facie an English company with English shareholders and an English directorate, had at the outbreak of war some property in a German colony, as to which property there is no evidence whatever of what has happened to it since the outbreak of war. Those being the facts, it appears to me impossible to find that at the time when the proof was sent in the Muhesa Rubber Company was an alien enemy. Some difficulties I can see may well arise on the sixth proposition in future, and I do not wish to decide them or to express any opinion thereon, but only to indicate them. Companies may have more residences than one. That was stated amongst other authorities by Buckley L.J. in *American Thread Co.* v. *Joyce.* (2) A company may be carrying on business in several countries one of

(1) [1916] 2 A. C. 307.
(2) (1912) 106 L. T. 171; (1913) 108 L. T. 353.

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them an enemy country. A case may arise where the claim has nothing whatever to do with the enemy country, and it may be said "You are in fact in one of your capacities carrying on business in an enemy country though not in the one with which we are concerned, but that prevents you from making any claim anywhere." I think such difficulties may very easily arise, but in this case I think no difficulty arises at all, because there is no evidence whatever before the Court that this company is in any worse position than that of an Englishman who at the outbreak of war had property in an enemy country and who is not proved to have done anything whatever with regard to that property since.

For these reasons I respectfully dissent from the decision of the learned judge that this was an enemy company and therefore not entitled to prove, and I only desire to say further that if it had been I do not think the trustee would have been justified in rejecting the proof. The claim would have had to be postponed till the end of the war. It would therefore be a future liability which the trustee would be bound to assess, and, admitting the proof and assessing the claim, retain the money, giving the Public Trustee notice, until the end of the war. But for the reasons I have stated I am of opinion, with the greatest respect to the learned judge below, that he came to a wrong conclusion and that the proof should be admitted. The claim is in marks, and we are not deciding anything as to the amount which the trustee ought to pay. He must find that out for himself.

Appeal allowed.

Solicitors for appellants : *Mayo, Elder & Co.*
Solicitors for respondent : *Charles F. Davis & Co.*

G. A. S.

BROOKE, APPELLANT *v.* COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

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July 13, 14;
Nov. 9.

Revenue—Super-tax—Non-resident—Property in the United Kingdom—Chargeability—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 66, 72.

By s. 66, sub-s. 1, of the Finance (1909-10) Act, 1910, there shall be charged, levied, and paid "in respect of the income of any individual, the total of which from all sources exceeds 5000*l.*, an additional duty of income tax," referred to in the Act as a super-tax; and by sub-s. 2, for the purposes of the super-tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts. By s. 72, sub-s. 6, all provisions of the Income Tax Acts relating to the persons chargeable and the collection and recovery of duty shall, so far as they are applicable, apply to the charge, assessment, collection, and recovery of the super-tax:—

Held, that any individual, although not resident in the United Kingdom, whose total income in the United Kingdom, when estimated in the prescribed manner, exceeds 5000*l.*, is chargeable with the super-tax in respect of that income.

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts under the Finance (1909-10) Act, 1910, and the Taxes Management Act, 1880.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on September 29, 1915, Marion Brooke, the appellant, appealed against an assessment to the super-tax in the sum of 11,000*l.*, less 3000*l.* statutory allowance, that is to say, 8000*l.* net, for the year ended April 5, 1912, made upon her by the description of Mrs. Marion Brooke (formerly Mrs. Marion Price) under the provisions of (inter alia) s. 66 and s. 72 of the Finance (1909-10) Act, 1910.

The appellant was a British subject. In 1900 she married a Mr. Price, with whom she lived for many years in England. Subsequently she separated from her husband and left England in 1908. During the years respectively ended April 5, 1911, and April 5, 1912, the appellant resided apart from her husband in France, and

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had no residence in, and did not come to, the United Kingdom. On June 14, 1912, the marriage of the appellant with Mr. Price was on his petition dissolved by a decree of the Divorce Court in England.

On March 12, 1914, the appellant married in Paris Mr. Brooke, and they thereafter lived in France, where the appellant had, up to and including the date of the hearing of the appeal against the assessment, a residence which early in the war came to be in the occupation of the Germans. In October, 1914, the appellant left France, and had ever since lived in England, either in a furnished flat or a furnished house. When the appellant left France, neither she nor her husband (who joined His Majesty's military forces in the course of the war) had any intention to reside permanently in the United Kingdom, and they always intended to return to France as their place of residence directly the circumstances admitted of their doing so. The appellant's husband had not had any residence in the United Kingdom, nor had he carried on any trade, business, or profession there since his marriage to the appellant. He had not had any income in the United Kingdom since his marriage beyond his army pay.

The appellant was entitled under the will of her father, who died in 1895, to a life interest in a share of his residuary estate and was restrained from anticipating that interest. The investments representing the residuary estate were all British and stood in the names of the trustees of the will, who were British subjects resident in England. The trustees had year by year received all the income derived from the appellant's share less income tax which was deducted at the source, and they paid the amounts received by them to the appellant's bankers in England for the credit of her account. Nearly the whole of the income of the appellant during the year ended April 5, 1911, was received from her share of her father's estate, and that income and the rest of her income for that year were received by her after the deduction of income tax at the source.

For the purposes of the super-tax to be charged for the year ended April 5, 1912 (the year in question in this case), it was not denied that the appellant received a notice requiring her to make a return of her total income from all sources for the year ended

April 5, 1911. The appellant declined to make a return on the ground that no assessment to the super-tax in respect of her total income fell to be made. The assessment of 11,000*l.*, or 8000*l.* net, was made upon her on March 15, 1915, when she was in England, and notice of the charge was served upon her in England.

On May 18, 1915, the appellant by her solicitors gave notice of appeal against the assessment, and stated that the grounds of appeal would include the following, namely :—"That the said Marion Brooke is not an individual liable to super-tax ; that she is not liable to be assessed to super-tax on account of the total income as mentioned in the said assessment or any of it, and that the said Marion Brooke is a married woman living with her husband and is resident out of the jurisdiction and was not resident in the jurisdiction during any part of the year of assessment ; and that the said assessment is bad in law."

In due course the Commissioners issued their precept to the appellant requiring a schedule to contain particulars of her total income from all sources for the year ended April 5, 1911, and on July 5, 1915, her solicitors rendered certain particulars of her income, without admitting any liability on her part either to super-tax or to render any account of her income.

It was agreed in the course of the hearing of the appeal before the Commissioners that for the purposes of this case, in the event of the appellant being held to be liable to be chargeable with and assessable to the super-tax, the appropriate total income of the appellant, estimated in the manner prescribed by s. 66 of the Finance (1909-10) Act, 1910, was 9864*l.*, and that the assessment would fall to be reduced to that sum.

The Commissioners held that the super-tax should be charged to the appellant and an assessment made upon her for the year ended April 5, 1912, in respect of her duly estimated total income from all sources in the United Kingdom, and they so held because they were of opinion that any individual, wherever resident, whose total income in the United Kingdom when estimated in the manner prescribed by the Finance (1909-10) Act, 1910, exceeded 5000*l.* was chargeable in respect of that income with the super-tax. The Commissioners reduced the assessment to 9864*l.*, less the statutory allowance of 3000*l.*, that is to say, to 6864*l.* net.

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Disturnal, K.C., and *A. M. Latter*, for the appellant. By s. 66, sub-s. 1, of the Finance (1909-10) Act, 1910, the super-tax is chargeable "in respect of the income of any individual, the total of which from all sources exceeds 5000*l.*" The words "any individual" must be read subject to some limitation, for otherwise they would mean every one in the whole world. The rule of construction applicable to a fiscal Act is that, unless Parliament has expressly declared otherwise, general words in the Act only apply to persons and things over which Parliament has jurisdiction: *Colquhoun* v. *Heddon*, per Lord Esher M.R. (1) It is impossible to suppose that a foreigner living abroad with an income of over 5000*l.*, a small portion only of which is derived from investments in this country, is liable to pay super-tax in respect of his total income. For the purpose of super-tax no distinction can be drawn between a foreigner and a British subject permanently resident abroad. A subject is not to be taxed unless there are clear words in the Act for that purpose: *Tennant* v. *Smith*, per Lord Halsbury (2); *Partington* v. *Attorney-General*. (3) There is nothing in the language of the Act of 1910 to show that the super-tax is chargeable upon persons permanently resident out of the jurisdiction. On the contrary, the provisions of s. 72 of the Act as to making assessments to the super-tax indicate that persons permanently residing abroad in the year of assessment are not chargeable. By sub-s. 6 of s. 72 all the provisions of the Income Tax Acts apply to the collection of the super-tax. Income tax is payable in respect of the property of persons resident in the United Kingdom (see s. 106 of the Income Tax Act, 1842), or in respect of property in the United Kingdom wherever the owner may reside, the property in each case being that comprised in Schedules A to E; but the super-tax is chargeable on the total income from all sources. In other words, the basis of the ordinary income tax is property, but in the case of the super-tax it is the individual, whose total income from all sources exceeds the specified amount. When one finds a special tax imposed upon individuals of a certain class, the presumption is that it only applies to individuals of that class who are within the jurisdiction. The

(1) (1890) 25 Q. B. D. 129, 135, 137.

(2) [1892] A. C. 150, 154.

(3) (1869) L. R. 4 H. L. 100, 122.

provisions of sub-s. 2 of s. 72 as to the making of a return by the agent of a non-resident must be used as applying only to persons temporarily residing abroad : see s. 66, sub-s. 2 (*c*). In the case of a permanent non-resident, whether a foreigner or a British subject, the agent in this country would not have sufficient knowledge to enable him to make a return of his principal's total income, and yet a penalty is imposed by sub-s. 4 of s. 72 for the failure to make a return. Further, in the circumstances of this case the appellant is not liable to be charged with income tax, because her whole income is derived from investments and the income tax is deducted at the source and is not payable by the appellant : *Purdie* v. *Rex.* (1) The appellant therefore is not chargeable to the super-tax.

If a person permanently resident abroad during the year of assessment is not chargeable to the super-tax, the fact that the appellant happened to be temporarily resident in England within the three years cannot impose a liability upon her.

Lastly, at the date when this assessment was made the appellant was a married woman living with her husband, and, therefore, under s. 45 of the Act of 1842 the assessment should have been made on the husband. Sect. 11 of the Revenue Act, 1911, indicates that prima facie the husband, and not the wife, is the proper person to be assessed to super-tax. [*Crookston Brothers* v. *Furtado* (2), *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (3), and *Kensington Income Tax Commissioners* v. *Aramayo* (4) were also referred to.]

Sir George Cave, S.-G., and *T. H. Parr* (for *Raymond Asquith*, serving with His Majesty's Forces), for the respondents. The super-tax is merely an additional income tax : *Bowles* v. *Attorney-General* (5) ; and it is chargeable upon the total income from all sources. The total income for the purpose of the super-tax is, by s. 66, sub-s. 2, to be taken to be the total income from all sources estimated in the same manner as the total income from all sources is estimated for the purpose of exemptions or abatements under the Income Tax Acts. In calculating exemptions or abatements under those Acts regard is had to the "aggregate annual amount" of

(1) [1914] 3 K. B. 112.
(2) (1910) 5 Tax Cas. 602.
(3) [1891] A. C. 531.
(4) [1916] 1 A. C. 215.
(5) [1912] 1 Ch. 123.

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income: see Income Tax Act, 1842, s. 163. Income tax is payable by non-residents on income arising in the United Kingdom. It is collected in one of three ways, either by deduction at the source, or from trustees or agents under s. 41 of the Act of 1842, or by a direct assessment on the non-resident whenever that is possible: see *Tischler* v. *Apthorpe* (1); *Werle & Co.* v. *Colquhoun.* (2) There is therefore no reason for limiting the words "any individual" in s. 66, sub-s. 1, or "persons who are to be chargeable" in s. 72, sub-s. 6, to residents: see also s. 66, sub-s. 2 (*c*), and s. 71. The effect of s. 72, sub-s. 6, and of s. 96, sub-s. 4, is that if there is in the United Kingdom property of a non-resident in respect of which income tax is payable, it is equally liable to the super-tax if the income exceeds 5000*l.* a year. If a person clearly comes within the enacting part of a taxing Act, he does not escape liability merely because there may be difficulties in the way of assessment: *Rex* v. *Newmarket Income Tax Commissioners.* (3) Sect. 72, sub-s. 2, expressly provides that in the case of a non-resident the return is to be made by an agent. It is said that it may be impossible for an agent to make a return of his principal's total income from all sources. The agent must make the best return that he can. A penalty is only imposed if the failure to make a return is without reasonable excuse.

With regard to the argument based on *Purdie* v. *Rex* (4), it is difficult to reconcile some of the reasons given for that decision with other cases in which it has been said that a company pays income tax only as agent for its shareholders: *Ashton Gas Co.* v. *Attorney-General.* (5)

It is not contended that if the appellant is not assessable to the super-tax by reason of her being a non-resident in the United Kingdom in the year of assessment she becomes assessable by subsequently coming to this country within the three years.

Sect. 45 of the Act of 1842 provides that the profits of any married woman living with her husband shall be deemed the profits of her husband, and the same shall be charged in the name of the husband. That means the husband at the time the profits were

(1) (1885) 52 L. T. 814.
(2) (1888) 20 Q. B. D. 753.
(3) [1916] 1 K. B. 788.
(4) [1914] 3 K. B. 112.
(5) [1906] A. C. 10.

made, not a husband subsequently married. Therefore, as the appellant was living apart from her then husband during the year for which the assessment was made, the assessment was properly made in her name and not in that of her present husband.

Disturnal, K.C., replied.

Cur. adv. vult.

1916. Nov. 9. ATKIN J. read the following judgment:—The appellant in this case appealed to the Commissioners for the Special Purposes of the Income Tax against an assessment to super-tax for the year ending April 5, 1912. The Commissioners affirmed the assessment but reduced it to an agreed amount. The appellant has appealed to this Court by way of special case.

The facts are set out in the special case. It is unnecessary to repeat them here. It is sufficient to say that the appellant for the financial year ending April 5, 1912, was living apart from her husband and resided in France and not at all in this country; that the marriage was subsequently dissolved and she married again; that she and her second husband came to reside in this country in 1914, but not with the intention of permanently residing here; that when so in this country she was assessed to super-tax by the assessment in question; that the income in respect of which she was so assessed was income of property in the United Kingdom.

The first point that was raised was that, being non-resident in the United Kingdom during the year in question, the appellant was not liable to pay super-tax. The super-tax was imposed by the provisions of the Finance (1909-10) Act, 1910. Part IV. of that Act is entitled "Income Tax" and includes ss. 65 to 72 inclusive, of which s. 66 and s. 72 relate to super-tax. Sect. 65 begins: "Income tax for the year beginning on the sixth day of April, 1909, shall be charged at the rate of 1*s.* 2*d.*," and proceeds to make further provisions as to income tax. Sect. 66 begins: "(1.) In addition to the income tax charged at the rate of 1*s.* 2*d.* under this Act, there shall be charged, levied, and paid for the year beginning on the sixth day of April, 1909, in respect of the income of any individual, the total of which from all sources exceeds 5000*l.*, an additional duty of income tax (in this Act referred to as a super-tax) at the rate of 6*d.* for every pound of the amount by which the total income exceeds 3000*l.*"

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The section proceeds to make various provisions as to the calculation of the income for super-tax purposes. Sects. 67, 68, 69, 70, and 71 relate to income tax; and s. 72 again relates to super-tax and contains special provisions as to how and by whom the super-tax shall be assessed and charged. Sub-s. 2 of s. 72 imposes a duty upon "every person upon whom notice is served . . . . by the Special Commissioners" to make a return of all his income, while sub-s. 3 imposes a duty upon "every person chargeable with the super-tax to give notice that he is chargeable to the Special Commissioners before the thirtieth day of September in the year for which the super-tax is chargeable." Sub-s. 6 provides that "All provisions of the Income Tax Acts relating to persons who are to be chargeable with duty, assessments, and appeals against those assessments, and to the collection and recovery of duty, ... shall, so far as they are applicable, apply to the charge, assessment, collection, and recovery of duty under this section." Sub-s. 8 gives power to the Commissioners to make regulations for the purpose of carrying this section into effect. Regulations have been duly made.

The effect of the Act and the regulations appears to be that the liability imposed by the Act is enforced by the Special Commissioners serving a notice upon every person required by them to make a return of his total income, and upon such return being made, or default in making it, by the Commissioners making an assessment to super-tax and serving notice thereof upon the individual assessed. The effect of the two sections appears to be that super-tax is income tax—see *Bowles* v. *Attorney-General* (1)—though subject to special provisions. The income in respect of which it is imposed is the total income from all sources estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts: Finance (1909-10) Act, 1910, s. 66, sub-s. 2. This reference incorporates (inter alia) s. 163 of the Income Tax Act, 1842—"the aggregate annual amount of his income estimated according to the several rules and directions of this Act"; and in this way are incorporated the various schedules to the Act of 1853. The provisions of the Income Tax Acts as to persons who are to be chargeable with duty are applied so far as

(1) [1912] 1 Ch. 123.

they are applicable. Inasmuch as the super-tax (s. 66, sub-s. 1) is only to be charged, levied, and paid in respect of the income of any individual, this appears to exclude corporations from persons chargeable. The substance of the enactment appears to be that persons chargeable with income tax (except corporations) are chargeable with super-tax, and that the income in respect of which they are charged is the aggregate of what I may call income-tax income. It is plain that non-residents are chargeable with income tax, for instance, on income derived from property within the United Kingdom: Income Tax Act, 1853, s. 2, Sched. D; and I think it follows that non-residents are charged with super-tax in respect of all that property in respect of which they are chargeable with income tax. The words of s. 66, sub-s. 1, "the income of any individual," are wide enough to cover non-residents—indeed they are so wide that they are clearly subject to some restriction; moreover, there is the express allowance of a special deduction made by s. 66, sub-s. 2 (*c*), "in the case of a person in the service of the Crown abroad"; and the incorporation by s. 72, sub-s. 2, of the provisions of s. 41 of the Act of 1842, enabling notice to be served on a person representing a non-resident person, seems to make the intention of the Legislature clear.

But it was said that the machinery for imposing liability by return and notice of assessment can only be made effectual when the individual is within the United Kingdom, and this indicates that it was not intended to impose a liability upon non-residents. If you can find a person responsible under s. 41 you can apply your machinery to him; otherwise you cannot enforce any liability. In this case it is not necessary to decide whether notice to make a return and notice of assessment, when made, can be given to a non-resident, whether a British subject or not, though apart from the exercise of any penal provisions over foreigners I have considerable difficulty in seeing why the requisite machinery cannot be applied to non-residents. In the case of super-tax the Commissioners are not hampered with the difficulties of local assessments as in the case of the income tax. But in the present case the appellant was assessed, and given notice of assessment, while resident in the United Kingdom within the period permitted by the Acts. As to the provisions of s. 41 of the Act of 1842, it has been held in the

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case of a foreigner carrying on business in this country that s. 41 is merely auxiliary to the general powers of the revenue authorities, and that if the foreigner ordinarily non-resident is found resident in the United Kingdom the ordinary machinery applicable to a resident can be applied to him: *Tischler* v. *Apthorpe* (1), approved in the Court of Appeal in *Werle & Co.* v. *Colquhoun.* (2) These cases appear to show conclusively that in the case of a non-resident the Commissioners are not restricted to the means provided by s. 41.

It was further contended on behalf of the appellant that in respect of the particular income in this case the appellant never became chargeable at all either to income tax or, a fortiori, to super-tax. The income tax in respect of the whole income was deducted at the source, being derived either from public securities or from the securities of municipal or other corporations. In these circumstances it is said that the appellant, even if resident here, was not herself chargeable with income tax and, therefore, is not liable to super-tax. The only persons chargeable with income tax under these circumstances are, it is said, the persons who make the deduction. Even if the proposition were true as to income tax, it would appear to me to be untrue as to super-tax, for by s. 66, sub-s. 1, the super-tax is charged "in respect of the income of any individual," the income being defined to be the total income from all sources; and by s. 72, sub-s. 3, it is the duty of every person chargeable with the super-tax to give notice that he is chargeable, and by "every person chargeable" I should understand to be meant every individual in respect of whose income super-tax is charged under s. 66, sub-s. 1. But I think it is fallacious to say that the individuals who receive income from which income tax is deducted at the source are not chargeable with the tax. I think there is some authority for the appellant's contention in the judgment in *Purdie* v. *Rex.* (3) The judgment in that case may be unassailable, but with the greatest respect I find it difficult to reconcile some of the reasoning of the learned judge in that case with the reasons given by the noble Lords in the case of *Ashton Gas Co.* v. *Attorney-General* (4), which does not seem to have been

(1) 52 L. T. 814.
(2) 20 Q. B. D. 753.
(3) [1914] 3 K. B. 112.
(4) [1906] A. C. 10.

cited in *Purdie* v. *Rex.* (1) If the payee has not paid income tax by allowing the deductions, as by the appropriate sections he is compelled to do, it is difficult to see how he escapes paying income tax on the net sum that comes into his hands. Sect. 163 of the Act of 1842 in terms seems to decide this point; it speaks of "any person charged or chargeable to the duties granted by this Act, either by assessment, or by way of deduction from any rent, annuity, interest, or other annual payment to which he may be entitled": see also the Taxes Management Act, 1880, s. 82. In truth this contention, if sound, is applicable in no way specially to non-residents, but would apparently exempt from super-tax all income from which income tax was deducted at the source. Such a construction of the Act would defeat the clear intention of the Legislature and cannot be adopted.

The next contention that was made on the part of the appellant was that, even if super-tax were chargeable in respect of the income of the appellant, at the date of the assessment she was married and living with her present husband, and therefore, pursuant to s. 45 of the Act of 1842, the income should be charged in the name of the husband. But the profits which are charged in this case are the profits for the year ending April 5, 1912, and were not in that year the profits of a married woman living with her husband (for the appellant was in that year living apart from her then husband), and therefore are not to be deemed the profits of the husband. I think, therefore, that the provisions of s. 45 do not apply, and that the profits are not to be charged in the name of the husband.

The appellant's last contention was that the decision of the Special Commissioners in reducing the amount of the assessment was irregular inasmuch as the Commissioners had not had before them the evidence of the appellant or other lawful evidence pursuant to s. 57, sub-s. 6, of the Taxes Management Act, 1880. But it appears from the case that the reduction was made by agreement, and under the circumstances this objection is not open to the appellant.

I am much indebted to counsel on both sides, including Mr. Parr, for a very careful argument. I think I have considered all the

(1) [1914] 3 K. B. 112.

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contentions put before me. For the reasons I have given the appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Nicholson, Patterson & Freeland.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

F. O. R.

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Oct. 30, 31; *Nov.* 10.

[IN THE COURT OF APPEAL.]

BRUCE MARRIOTT & CO. *v.* HOULDER LINE, LIMITED.

[1914 B. 3605.]

Shipping—Bill of Lading—General Ship—Loading at Different Ports—Right to re-stow Cargo—Landing Cargo for Purpose of re-stowing—Cargo damaged while on Quay—Exceptions in Bill of Lading.

The plaintiffs shipped in London certain mining machinery on board the defendants' steamer *Denby Grange* for carriage to Buenos Aires via Newport under a bill of lading which gave the steamer liberty to proceed to and stay at other ports for loading or discharging cargo. The bill of lading excepted liability for loss or damage arising from (inter alia) breakage. The *Denby Grange* was a general ship carrying cargo for various ports in the River Plate. She loaded cargo at Antwerp and proceeded to London, where she took on board the plaintiffs' machinery and other cargo. She then proceeded to Newport, where she was to load a large quantity of cargo. It was found necessary at Newport for the safe stowage of the cargo and for the proper trim of the ship that two large cylinders, part of the plaintiffs' mining machinery, should be taken out of the hold in which they were stowed and re-stowed in another hold, and for this purpose they were placed temporarily on the quay. The evidence showed that such a dealing with a portion of the cargo in the case of a general ship like the *Denby Grange*, which was intended to load and discharge cargo at various ports, was quite usual. One of the cylinders while on the quay was damaged:—

Held, that in removing the cylinders from the hold in which they had been stowed with a view to stowing them in another hold, and in the meantime temporarily placing them on the quay, the defendants did not commit any breach of their contract of carriage, and were therefore protected by the exceptions in the bill of lading.

APPEAL from the judgment of Rowlatt J. at the trial of the action without a jury.

The action was brought to recover damages for breach of contract

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and breach of duty in the carriage of goods in the defendants' steamship *Denby Grange*.

The plaintiffs shipped on board the *Denby Grange* at London certain mining machinery, consisting of 105 pieces or packages, for carriage to Buenos Aires under a bill of lading dated March 14, 1914. The bill of lading stated that the goods were shipped in apparent good order and condition on board the *Denby Grange*, "sailing from the Port of London for carriage to Buenos Aires via Newport but with liberty to the steamer, either before or after proceeding towards that port, to proceed to and stay at any ports or places whatsoever (although in a contrary direction to or out of or beyond the route to the said port of discharge) once or oftener in any order, backwards or forwards, for loading or discharging cargo or passengers, or for any purpose whatsoever, and all such ports, places and sailings shall be deemed included within the intended voyage"; and that the goods, subject to the exceptions and stipulations thereinafter mentioned, were to be delivered "in the like apparent good order and condition from the ship's tackle (where the ship's responsibility shall cease) at the port of Buenos Aires or so near thereto as she may safely get and always lie afloat." Clause 1 of the exceptions and stipulations provided "that the master, owners, or agents of the vessel, or its connections, shall not be responsible for loss, damage, or injury arising from any of the following perils, causes, or things, namely: . . . . breakage . . . . stowage . . . . transhipment, landing . . . . whether any of the perils, causes, or things above mentioned, or the loss, damage, or injury arising therefrom be occasioned by, or arise from any act or omission, negligence, default or error in judgment of the pilot, master, mariners, engineers, stevedores, workmen, or other persons in the service of the shipowners or their agents, whether on board the said ship or any other ship belonging to or chartered by them, for whose acts they would otherwise be liable, or otherwise howsoever." Clause 4: "The master, owners, or agents of the vessel have liberty to carry the said goods by the above steamer or other steamer or steamers . . . . and, in so doing, without notice to shippers or consignees, to carry the goods past their port of destination, or land them at intermediate ports, and to tranship or land and store the goods, either on shore or afloat, and re-ship and forward the same by land, or by water, by

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craft, steam, sail, or barge, whether in tow or otherwise, at the steamer's expense but merchants' risk, it being understood that all claims for loss or damage consequent upon delay or detention of the goods from the foregoing or any other cause are excluded."

The *Denby Grange* was a general ship carrying cargo to ports in the River Plate. She left Antwerp with cargo for London, where she loaded the plaintiffs' mining machinery and other cargo. She then proceeded to Newport, where she was to take in more cargo, and in order to stow the cargo the plaintiffs' cylinders were taken out of the hold in which they were stowed and placed temporarily on the quay for the purpose of being stowed in another hold. While on the quay one of the cylinders was damaged, and the cylinder was in consequence not sent on in the steamer. The plaintiffs brought this action to recover for the damage so caused. The defendants relied upon the exceptions in the bill of lading.

At the trial before Rowlatt J. the facts relating to the landing of the cylinders at Newport were agreed as being those stated in the following paragraph in a letter of March 22, 1914, from the defendants' representative at Newport to the defendants in London: "As informed you previously, we had to shift the cylinder forming portion of condensing plant on account of the Bruce Marriott Co. shipped in London in order to make stowage for earthenware pipes here. This we landed on the quay alongside the ship for the time being, and whilst shipping underframes yesterday in the No. 3 hold a gust of wind caught one of the frames as it was being lifted on board, with the result that it swung round, breaking the sling, and the underframes fell on the quay on to the cylinder No. 2366, breaking the cast-iron flange, indenting the tube and crushing same."

Rowlatt J. held that the defendants were not entitled under the bill of lading to take the cylinder out of the vessel and place it on the quay for the purpose of re-stowing it, and that therefore they were not protected by clause 1 of the exceptions; and that clause 4 did not apply, as it referred to a change in the mode of conveyance from one ship to another, or possibly to land carriage. He therefore gave judgment for the plaintiffs. The defendants appealed.

The appeal came on for hearing on February 8, 1916, when the Court were of opinion that the facts relating to the shifting and landing of the cylinders at Newport and the reason therefor were not

sufficiently stated to enable them to determine the question between the parties, and they directed the appeal to stand over for further evidence. Accordingly the defendants' manager at Newport, who superintended the stowage of the *Denby Grange* there, made an affidavit from which the following appeared:—On the steamer's arrival at Newport it was found that the two cylinders had been stowed in the wings of No. 4 'tween deck and a casting for Zarate had been stowed in the square of the hatch. These cylinders weighed 3 tons 11 cwt., but owing to their large size, being 16 feet long by 5 feet diameter, they occupied a very large space and were light cargo. "4. This steamer loaded a quantity of railway material at Antwerp and also at Newport, including several heavy lifts. She was to discharge this cargo at Zarate, and I was informed that there was no crane there capable of dealing with this heavy stuff. The owners accordingly arranged that the steamer's masts should be specially strengthened to enable them to deal with it. 5. The steamer's masts had to be lifted out, and it was therefore impossible to load any cargo in the after part of Nos. 1 and 3 'tween decks until this work was completed. 6. No. 2 'tween deck was to be used for bunker coals as that is the only 'tween deck available for the purpose. It was for these reasons that the casting for Zarate and the cylinders were loaded in No. 4 'tween deck." Paragraph 7 stated that the cargo to be loaded at Newport weighed 1756 tons, and included (among other things) railway material, galvanized sheets, tinplates, ironplates, and a very large quantity of earthenware pipes for Buenos Aires. "These pipes are very brittle and require very careful stowage, and should not be stowed with any other heavy cargo. It is also most important that any broken stowage should be avoided, otherwise the pipes are apt to get adrift and get broken. 8. The steamer was to discharge at several ports in the River Plate and to go up to Zarate, which is some way up the river. The cargo had therefore to be stowed so as to maintain the steamer as far as possible on an even keel after the discharge of part of it in order that she might draw as little water as possible. In order to effect this it was necessary to stow light cargo in No. 4 so that the steamer might start a little down by the head. If the cylinders and casting had been left in No. 4 'tween deck it would have been necessary to block them off with heavy cargo, which would have put the steamer down by the

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stern. As the bunker coal in No. 2 'tween deck was consumed on the outward passage, the steamer would get to some extent down by the stern, and it was for this reason that she had to start down by the head. 9. The draught of the steamer on sailing was 22 feet 5 inches forward and 22 feet 2 inches aft. 10. For these reasons I found that the only practical method of stowing the ship safely was to take the castings out of No. 4 'tween deck and put them into No. 1 'tween deck. By this means the whole of No. 4 'tween deck contained earthenware pipes. The cylinder and casting were placed in No. 1 'tween deck in the square of the hatch, where they could be safely stowed. The earthenware pipes in No. 1 hold were shut off from the rest of the cargo at the forward end by a number of cases of stonework which were well secured. It was absolutely necessary for the safe stowage of the cargo and for the trim of the ship that this method of stowage should be adopted, and this could only be done by shifting the cylinders. 11. It is by no means unusual with liners like the *Denby Grange* loading cargo at various ports and discharging at various ports to find it necessary to re-stow part of the cargo at Newport, and in some cases it is necessary to take the cargo out of the ship and put it on the quay for a short time in order to enable the cargo to be safely stowed. It is not always possible to ascertain what cargo will be available for a particular ship at Newport before she commences to load her cargo at Antwerp or London, and even if this were possible sometimes it is impossible to stow the cargo at the previous ports in such a way that it does not require re-stowage at Newport when the fresh cargo is put in owing to the order in which the cargo has to be discharged. 12. In the circumstances wherever these cylinders and casting had been stowed in London it would have been necessary to take them out and re-stow them at Newport. 13. To shift the cargo is a source of great trouble to the shipowner and delay to the steamer, and I never shift any cargo unless it is absolutely necessary for safety."

The appeal was argued upon this statement of facts on October 30, 31, 1916.

Roche, K.C., and *Lewis Noad*, for the defendants. This was a bailment of goods to be carried in a general ship calling at different ports to load and discharge cargo. Liberty to load at various ports

necessarily involves the right to do everything necessary for the proper loading of the ship. There was therefore an implied term in the contract of bailment that the shipowners might, when loading cargo at Newport, shift the cargo already loaded and re-stow it if it was reasonably necessary to do so for the safety of the ship or for the proper stowage of the cargo or preserving the trim of the ship, and for that purpose might land the cargo and re-ship it. The evidence shows that it was reasonably necessary as a matter of business to land the cylinders for the purpose of re-stowing them in another hold, and therefore the defendants were not committing a breach of contract in so doing. They were acting within the contract of bailment, and are protected by the exception of " breakage " in the bill of lading even if occasioned by the negligence of their servants, which is not admitted. The cylinders were not landed merely for the convenience of the defendants, but as a matter of practical business necessity for the purpose of properly stowing the other cargo and rendering the ship seaworthy in the sense of being reasonably fit to carry the cargo and deliver it at the various ports in the River Plate. The cases of *Davis* v. *Garrett* (1), *Le Duc & Co.* v. *Ward* (2), —deviation cases—and *Lilley* v. *Doubleday* (3), which are relied upon by the plaintiffs, have no application in the circumstances of this case.

MacKinnon, K.C., and *Darby*, for the plaintiffs. The bailment was for conveyance of the plaintiffs' goods from London to Buenos Aires. Unless there is some term either expressed or implied in the contract of bailment giving the shipowners power to unload the goods at an intermediate port and land them, unloading the goods and landing them at Newport was an unauthorized act outside the contract of bailment. There is clearly no express term authorizing the act. Nor is there any implied term. A term cannot be implied in a written contract unless an implication necessarily arises that the parties must have intended that the suggested stipulation should exist: per Lord Esher M.R. in *Hamlyn & Co.* v. *Wood & Co.* (4), approving the principle laid down by Bowen L.J. in *The Moorcock*. (5) It cannot be said that the plaintiffs ever contemplated

(1) (1830) 6 Bing. 716.
(2) (1888) 20 Q. B. D. 475.
(3) (1881) 7 Q. B. D. 510.
(4) [1891] 2 Q. B. 488, 491.
(5) (1889) 14 P. D. 64, 68.

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that their goods would be taken out of the hold, where they were stowed in London, and landed on the quay at Newport, where they would be exposed to great risk. The plaintiffs' cargo was taken out of the ship and placed on the quay for the convenience of the defendants so as to enable them to take in more cargo at Newport. The plaintiffs had no concern with any cargo which the shipowners might wish to take in at Newport. It is not necessary to consider whether a mere shifting of the cargo in the hold where it was loaded would be an authorized act. No such term as the defendants allege can be implied from the fact that the ship is a general ship. The principle upon which the deviation cases, such as *Davis* v. *Garrett* (1) and *Le Duc & Co.* v. *Ward* (2), rest applies here. The act of the defendants in putting the cylinders on the quay was outside the contract, and they are not protected by the exceptions in the bill of lading. [*Sleat* v. *Fagg* (3) and *Lilley* v. *Doubleday* (4) were also referred to.]

Roche, K.C., in reply, referred to *Roberts* v. *Shaw.* (5)]

Cur. adv. vult.

Nov. 10. SWINFEN EADY L.J. read the following judgment :— The plaintiffs were shippers of certain mining machinery on board the defendants' steamship *Denby Grange* for conveyance from London to Buenos Aires via Newport, Mon. A large cylinder 16 feet by 5 feet diameter, part of this machinery, was accidentally injured on the quay at Newport during the course of re-stowage operations there. The plaintiffs claim the amount of the damage sustained by them by reason of the defendants' failure to deliver the goods at Buenos Aires in the like good order and condition as at the time of shipment. The defendants admit the accident, but rely upon the exceptions contained in the bill of lading as exempting them from liability. Rowlatt J. at the trial held that the defendants were not protected from the loss which had happened by the terms of the bill of lading, and against this decision the defendants appeal.

The case was tried before the judge upon an agreed statement of

(1) 6 Bing. 716.
(2) 20 Q. B. D. 475.
(3) (1822) 5 B. & Al. 342.
(4) 7 Q. B. D. 510.
(5) (1862) reported in Stevens on Stowage, 6th ed., pp. 593, 594. See also 4 B. & S. 44.

facts, but during the hearing of the appeal on February 8 last it became manifest that the facts were insufficiently stated to enable the Court to determine the real dispute between the parties, and moreover the parties were at issue as to the meaning of their respective admissions, and the Court allowed the matter to stand over for further evidence. This has since been filed, and the case now comes on again for rehearing before a Court differently constituted, and with this further evidence before it.

The *Denby Grange* is a steamer of the Houlder Line, of a dead weight capacity of upwards of 7000 tons, carrying a general cargo on this voyage. She commenced her voyage at Antwerp, where she loaded a quantity of railway material; she then proceeded to London, where she took on board a quantity of general cargo, including the plaintiffs' machinery, which consisted of 105 pieces or packages in all, weighing upwards of 43 tons. She then proceeded to Newport, where she was to take on board upwards of 1750 tons of cargo, including a large quantity of heavy railway material, galvanized sheets, tinplates, and ironplates, and including also a very large quantity of earthenware pipes for Buenos Aires, which are very brittle, require careful stowage, and should not be stowed with any other heavy cargo.

Amongst the plaintiffs' machinery loaded in London were two cylinders, each weighing 3 tons 11 cwt., one of which was subsequently damaged at Newport. On the voyage from London to Newport these cylinders had been stowed in the wings of No. 4 'tween deck hold. The steamer was to discharge at several ports in the River Plate and to go up to Zarate, which is some way up the river. The cargo had to be stowed so as to maintain the steamer on an even keel after the discharge of part of it in order that she might draw as little water as possible.

The defendants established by their evidence, which was uncontradicted, that the only practicable method of stowing the ship safely, having regard to the nature and extent of her cargo and the ports and places to which it was consigned, was to take the plaintiffs' castings out of No. 4 'tween deck hold and put them into No. 1 'tween deck hold. The defendants' manager at Newport deposed that it was absolutely necessary for the safe stowage of the cargo and for the trim of the ship that the method of stowage which was adopted, and

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which in the evidence is described in detail, should be followed, and this could only be done by shifting the plaintiffs' cylinders. There was also evidence that it is by no means unusual with liners like the *Denby Grange*, which load cargo at various ports and discharge at various ports or places, to find it necessary to re-stow part of the cargo, and in some cases it is necessary to take part of the cargo out of the ship and put it on the quay for a short time in order to enable the whole cargo to be safely stowed. Moreover, it is not always possible to ascertain what cargo will be available for a particular ship at Newport before she commences to load her cargo at Antwerp or London, and, even if this were possible, it is sometimes impossible to stow the cargo at the previous ports in such a way that it will not require re-stowage at Newport, when the fresh cargo is put on board, owing to the order in which the cargo has to be discharged. Shifting the cargo is a source of trouble and expense to the shipowner and delay to the steamer, and according to the evidence of the defendants they never shift any cargo unless absolutely necessary for safety.

The damage in question in this action occurred while the cylinder was resting on the quay; an underframe of a railway carriage was caught by the wind, broke several strands of a wire hawser, and fell upon and fractured a portion of the cylinder. Breakage, even though occasioned by the negligence of the shipowner's servants, is an excepted peril; but the plaintiffs contended that the rule was "once stowed, always stowed"; that the shipowners had no right, having once stowed their goods in No. 4 hold, to remove them to No. 1 hold, and certainly not to remove them from the ship and deposit them on the quay in order to re-stow them in No. 1 hold; and that, as the defendants were acting in breach of their contract of carriage when the accident occurred, they were not protected by the exception. The defendants did not dispute that if they were acting in breach of their contract they could not rely upon the protection afforded by the bill of lading, but they claimed that the contract of affreightment entitled them to re-stow in the manner they did.

The question therefore resolves itself into this: Were the defendants, under the circumstances which I have stated, entitled to remove the cylinder from No. 4 to No. 1 'tween deck hold? In my opinion they were. Both parties must be presumed to have con-

tracted with reference to the known, usual, well-established, and even necessary course of business. The presumption is that the parties intended to contract with regard to the well-known usages of trade. When necessary to re-stow for the safety of the ship, or to obtain and preserve a proper trim, or to enable the rest of the cargo to be safely and properly stowed, a usage to do so is certainly reasonable.

Where a general ship loads cargo at various ports which is intended to be discharged at different places, it is manifest that the cargo cannot always be taken on board in such order that the last loaded shall be the first to be discharged, or that the cargo last taken on board is suitable for being over-stowed on cargo already shipped. The proper stowage of the cargo and the necessary readjustment of weight to preserve the proper trim of the ship may necessitate changes in stowage from time to time, and these were necessarily incidental to the voyage of this ship.

I am of opinion that in removing the cylinder from No. 4 hold with a view to stowing it in No. 1 and in the meantime temporarily depositing it on the quay the defendants were not committing any breach of their contract of carriage as contained in the bill of lading, and accordingly that they are exempted from liability for the damage which occurred. The appeal must be allowed and judgment entered for the defendants with costs here and below.

BANKES L.J. read the following judgment:—In this case the respondents shipped a quantity of mining machinery, including two cylinders, on board the appellants' steamship *Denby Grange*, then in the Port of London, for conveyance to Buenos Aires. The said vessel was one of the appellants' line trading with general cargo between English and Continental ports and ports in South America. The next port at which the vessel was due to call for cargo after leaving London was Newport. The bill of lading described the intended voyage as a voyage from London to Buenos Aires via Newport but with liberty to the steamer, either before or after proceeding towards that port, to proceed to and stay at any ports or places whatsoever (although in a contrary direction to or out of or beyond the route to the said port of discharge) once or oftener in any order, backwards or forwards, for loading or discharging cargo or

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passengers, or for any purpose whatsoever; and all such ports, places, and sailings should be deemed included within the intended voyage.

The bill of lading contained the usual long list of exceptions in which stowage, breakage, landing at any time or in any place, and negligence of the shipowner's servants or agents are included. It also contained a special clause dealing with transhipment. The cylinders when loaded on board in London were stowed in No. 4 'tween deck hold. On arrival at Newport the cylinders were taken out of that hold and laid on the quay, the intention being to replace them into No. 1 'tween deck hold. While on the quay one of the cylinders was damaged. The respondents brought their action alleging that the appellants had committed a breach of contract in unloading the cylinder and placing it on the quay and in failing to deliver it at Buenos Aires. The appellants denied the alleged breach of contract, and asserted their right to deal with the cylinder under the contract of carriage in the way in which they had dealt with it.

The action was tried before Rowlatt J. upon an agreed statement of the facts relating to the damage to the cylinder contained in a letter dated March 22, 1914. The statement in this letter was in the following terms: [The Lord Justice read the statement as set out above.] On this statement of facts Rowlatt J. decided in favour of the respondents. When the appeal came on it appeared to the Court that upon the agreed statement of facts the question as to the circumstances under which the cylinder came to be taken out of No. 4 hold and laid on the quay was left in a very uncertain and unsatisfactory position. The appeal therefore stood over for a further statement, and as a result the appellants' manager at Newport made an affidavit upon which he has been cross-examined. The effect of his affidavit is that it was necessary to remove the cylinder from the No. 4 hold and to place it where it was temporarily, with a view to its being stowed in No. 1 hold in order to enable the ship to be properly stowed and to secure a proper trim. He also stated that such a dealing with portions of the cargo was quite usual. In my opinion the cross-examination did not displace the statements contained in the affidavit.

Under these circumstances the question which has to be decided is whether, upon the facts as now disclosed, a term must be implied in the contract as contained in the bill of lading by which the appellants

are entitled to move any goods after they have been placed on board, even to the extent of taking them out of the ship, if such moving is either usual in the course of loading or unloading the vessel at the authorized ports of call, or necessary for the safety or trim of the ship or the safety of the cargo. We were referred to the test applied by Lord Esher in *Hamlyn & Co.* v. *Wood & Co.* (1) where he says: "I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist."

Having regard to the fact that this vessel was under the terms of the contract to call at a number of ports to take in cargo, and at a number of ports to discharge cargo, it appears to me a necessary implication that the parties must have intended that the shipowners shou'd have liberty to shift the cargo, should necessity arise to do so, either for the safety of ship or cargo, or in the usual course of loading or unloading at the port of call. I cannot see any limitation to that right to shift provided what is done comes within the limits of what is reasonable or customary. If the right to shift extends to a right to shift from one part of a hold to another part of the same hold, or from one hold to another hold, it must, I think, necessarily extend to placing the cargo on the quay for such time as may be reasonably necessary to enable this to be effectively done. The question is necessarily a business question. The only evidence before the Court is that of the appellants' manager. So far as my own experience of such matters is concerned, it appears to me that the view he presents is a reasonable one, and that the stowing and discharging of a general cargo, consisting possibly of very many parce's of goods belonging to different owners, taken in at a number of ports, and to be discharged at a number of other ports, would be practically impossible unless such a liberty existed. In this view of the contract the appellants are entitled to succeed, because it is not disputed that if what the appellants did was within the terms of the contract the exceptions are wide enough to protect them from liability.

For these reasons I think that the appeal succeeds.

(1) [1891] 2 Q. B. 491.

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LAWRENCE J. read the following judgment :—The question in this case is whether the landing of these cylinders at Newport for the purpose of re-stowing them was within the contract of carriage, that is, was the exercise of a right of the shipowner under it. I think it was. In my opinion it was incident to the voyage contemplated by this bill of lading. The ship was a general ship, intending to call at several ports, and the voyage involved going up the river, where banks and shallows made the trim and handiness of the ship of great importance. The cylinders were very light relatively to the space they occupied. It must have been obviously probable that the cargo to be taken in after the ship left London would involve some readjustment of weights to enable her to keep her trim. These considerations make it easy to accept the evidence called after the first hearing by the leave of the Court. This evidence is to the effect that upon such a voyage it is the ordinary course to land and re-stow cargo where necessary.

The next question is : Does the bill of lading contain exceptions covering the shipowner against risks in so doing ? I think it does. I agree with my brother Rowlatt that clause 4 of the exceptions does not apply here. It is directed to a different set of circumstances, namely, to a case of transhipment to another ship or to some form of land carriage. But I think clause 1 excepts the shipowner from liability for this damage to the cylinder. It excepts liability for loss or damage arising from, inter alia, " breakage," " stowage," " landing," and this even though due to negligence. The " delivery " to be made by the ship is " from the ship's tackle . . . . at the port of Buenos Aires or so near thereto as she may safely get and always lie afloat." These exceptions seem to me to include such a " breakage " as occurred to this cylinder when landed for re-stowage at Newport.

I think, therefore, that the defendants are not liable, and that this appeal should be allowed.

Appeal allowed.

Solicitors for plaintiffs : *Parker, Garrett & Co.*
Solicitors for defendants : *William A. Crump & Son.*

W. F. B.

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Oct. 25, 30.

Metropolis—General Line of Buildings—Certificate of Superintending Architect—Order of Tribunal of Appeal—Definition of Building Line—Conclusiveness—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 22, 25, 183.

In 1897 the superintending architect of metropolitan buildings, appointed under the London Building Act, 1894, was called upon to define the general line of buildings in a street with reference to a certain plot of land which formed part of a row of premises in the street lying between two side streets. The architect issued his certificate under s. 22 of the Act defining the building line in that part of the street which lay between the two side streets. The owner of the land appealed to the tribunal of appeal, which by an order of March 12, 1897, varied the certificate and determined that the building line was in a different position and that it extended beyond one of the side streets. In May, 1912, the superintending architect was called upon to define the building line in the same street with reference to a building in the same row of premises as the plot of land above referred to. No buildings altering the building line had been erected in this part of the street since 1897. The architect issued his certificate defining the building line to be as defined by the architect's certificate issued in 1897. On appeal to the tribunal of appeal by a person claiming to be aggrieved by the certificate, it was contended that the building line in the part of the street in question had been finally determined by the tribunal's order of March 12, 1897. It was contended for the London County Council that that order was made without jurisdiction in that it purported to define the building line in a part of the street which had not been dealt with by the architect's certificate, and evidence was tendered by the Council to prove that the building line was as defined by the architect's certificates issued in 1897 and 1912. The tribunal rejected the evidence and made an order reversing the certificate of May, 1912:—

Held, that the order of the tribunal of appeal of March 12, 1897, was made within the jurisdiction of the tribunal and that the building line was finally and conclusively defined by that order, and that the evidence tendered had been rightly rejected.

In re London County Council (1904) 91 L. T. 501 approved.

CASE stated by the tribunal of appeal under the London Building Act, 1894 (hereinafter referred to as the tribunal), at the request of the London County Council (hereinafter called the Council), on certain

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questions of law involved in an appeal to the tribunal under s. 25 of the said Act against a certificate of the superintending architect of metropolitan buildings dated May 31, 1912.

By a certificate dated February 6, 1897, and a plan annexed thereto, the superintending architect defined the general line of buildings on the south side of that part of Euston Road lying between Southampton Street on the west and Fitzroy Street on the east, with reference to a plot of land at the corner of Euston Road and Southampton Street, as being a line approximately fifty feet from the inner edge of the pavement.

The owner of the said plot deeming himself aggrieved by the certificate appealed to the tribunal, under s. 25 of the London Building Act, 1894, and the tribunal by an order dated March 12, 1897, varied the certificate of the superintending architect and decided and determined that "the general line of buildings on the southern side of Euston Road between Southampton Street and Tottenham Court Road, of which the block between Fitzroy Street and Southampton Street" in which the appellant's premises were situate formed a part, was as defined by a line on the plan annexed to the certificate, which line was practically the inner line of the pavement.

No proceedings of any kind had been taken for the purpose of appealing against this order of the tribunal.

By a certificate dated May 31, 1912, and a plan annexed thereto, the superintending architect defined the general line of buildings on the south side of Euston Road between Southampton Street and Fitzroy Street with reference to a building site, No. 353, Euston Road. The line shown on the plan was substantially the same as the line shown on the plan annexed to the certificate of the superintending architect of February 6, 1897.

The building site in the last paragraph mentioned was two doors off the plot of land in reference to which the superintending architect had defined the general line of buildings by his certificate of February 6, 1897, but the streets between which the line was defined were the same in each case. The general line of buildings as defined by the order of the tribunal of March 12, 1897, also included the south side of Euston Road between the said streets.

The respondent Galsworthy, who was the owner of a one-storey building, No. 347, on the south side of the Euston Road, and of a

house, No. 49, in Warren Street, which building and house were situate between Southampton Street and Fitzroy Street, deeming himself aggrieved by the certificate of May 31, 1912, appealed to the tribunal against the certificate. Upon the appeal being opened the tribunal decided to hear any evidence that might be adduced as to whether any buildings had been erected since the date of the order of March 12, 1897, which had or might have altered or affected the general line of buildings determined by that order, but no such evidence was adduced; nor did the Council contend that any such buildings had been erected, though one new building had been erected at the corner of Southampton Street and Euston Road pursuant to a consent dated November 4, 1902.

It was contended on behalf of the respondent that the question of the general line of buildings on the south side of the Euston Road between Southampton Street and Fitzroy Street had been determined by the order of March 12, 1897, and was res judicata.

It was contended on behalf of the Council that the order of March 12, 1897, was bad, or at any rate not binding on the tribunal, on the ground that the tribunal had thereby purported to define the general line of buildings in a portion of Euston Road, namely, the portion between Fitzroy Street and Tottenham Court Road, which had not been considered or dealt with by the superintending architect, and in which the building giving rise to the certificate was not situate. On this point *In re London County Council* (1) was referred to.

The Council tendered evidence to show (1.) that as a result of certain local Acts there was in existence in this part of the Euston Road at the passing of the Metropolis Management Act, 1855, and at the passing of the Metropolis Management Amendment Act, 1862, an ascertained and indisputable general line of buildings in substantially the same position as the line defined by the certificate of May 31, 1912; (2.) that from the year 1855 onwards such general line of buildings was treated by the Metropolitan Board of Works and by all parties concerned as being the general line of buildings, and that consents were asked for, given, and refused under s. 75 of the Metropolis Management Amendment Act, 1862, upon the basis of such line being the general line of buildings; (3.) that in making

(1) 91 L. T. 501.

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its order of March 12, 1897, the tribunal took into account as buildings in the Euston Road a number of one-storey and other buildings which had been erected on the forecourts between the old general line of buildings and the Euston Road either unlawfully, or lawfully but pursuant to consents given by the Metropolitan Board of Works or their successors under s. 75 aforesaid, and did not take into account the buildings in the rear of such one-storey and other buildings erected on the forecourts or the general line thereof; and (4.) that the buildings which in fact constituted the general line of buildings in and after the year 1855 still remained in 1897 and were the only buildings in that part and on that side of the Euston Road except the buildings which had been so put up as aforesaid on the forecourts of the old houses either unlawfully or by consent.

It was further contended on behalf of the Council that the order of March 12, 1897, was bad, or at any rate the tribunal was not bound by it, because the tribunal had no power to alter an ascertained and established general line of buildings, and further because the tribunal took into account and proceeded upon a number of buildings which it could not lawfully take into account, and because the general line determined by the order was not the general line of buildings in that part of the Euston Road, but was the general line of a different set of buildings altogether.

It was contended on behalf of the respondent that the tribunal was concluded by the order of March 12, 1897, from hearing the evidence offered on behalf of the Council as above stated; nevertheless, if the occasion should arise, the respondent was prepared to adduce rebutting evidence.

The tribunal declined to hear the evidence offered by the Council and made an order dated November 21, 1912, allowing the appeal with costs and reversing the certificate of May 31, 1912. The tribunal was requested by the Council to submit for the opinion of the Court the following questions:—

(1.) Whether the order of March 12, 1897, was good and binding on the tribunal having regard to the fact that it included a portion of the road which had not been dealt with by the superintending architect and in which the building the subject of his certificate was not situate.

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(2.) Whether the tribunal ought to have heard the evidence offered on behalf of the Council or any part of such evidence.

(3.) Whether on the facts stated the tribunal had jurisdiction to make, and was right in law in making, the order of November 21, 1912.

If the Court should be of opinion that the tribunal was not concluded by the joint effect of the order of March 12, 1897, and the facts above set out, the Court was requested to remit the matter to the tribunal to be further dealt with in accordance with such opinion as the Court should be pleased to express.

Upjohn, K.C., and *Craig Henderson*, for the appellants. The order made by the tribunal of appeal on March 12, 1897, was not binding and conclusive on the tribunal in these proceedings, and the evidence tendered by the appellants should have been received. The tribunal exceeded its jurisdiction in making the order of 1897. Sect. 22 of the London Building Act, 1894 (1), speaks of "any street or part of a street place or row of houses," and s. 24 speaks of "block or row." This shows that "row" and "block" are synonymous terms. The meaning of s. 22 is that, if the building in question is situate in a row or block of houses, the superintending architect is bound to define the general line of buildings in that row or block, and he cannot take into consideration any buildings which are outside of that row or block: *Barlow* v. *Kensington Vestry*. (2) The superintending architect by his certificate of February 6, 1897, defined the building line for a row of houses, namely, the houses between Southampton Street and Fitzroy Street. The tribunal had no jurisdiction in dealing with the appeal from that certificate to define the building line for a part of the street which was beyond that row of houses. The jurisdiction of the tribunal is confined to dealing with the particular building line as defined by the architect. The decision of Wills and Kennedy JJ. to the contrary effect in *In re London County Council* (3) was wrong. The tribunal could not give itself jurisdiction to decide the general line of buildings by wrongly finding as a fact that the building in question was not situate in the row or block in which it was in fact situate.

(1) See note on p. 96, post. (2) (1886) 11 App. Cas. 257.
(3) 91 L. T. 501.

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[VISCOUNT READING C.J. referred to *Reg.* v. *Commissioners for Special Purposes of the Income Tax.* (1)]

When the superintending architect has decided that the building line must be defined with regard to a particular row of houses and the tribunal is of opinion that a larger portion of the street ought to be included, the tribunal must remit the case to the architect to define the building line for that larger portion, otherwise the provisions of s. 24 of the Act as to the notices of the certificate to be given by the architect to other house owners cannot be complied with. [*London County Council* v. *Clode* (2) was also referred to.]

E. M. Pollock, K.C., and *Herbert Smith*, for the respondent, were not called upon to argue.

VISCOUNT READING C.J. This case arises upon a decision of the appeal tribunal under the London Building Act, 1894, that the tribunal was precluded from considering questions which it was desired to raise as to the validity of an order made by the tribunal on March 12, 1897, defining the general line of buildings in a part of the Euston Road. The first and most important question is whether the tribunal rightly decided that the order of March 12, 1897, was binding upon it and that its validity could not be called in question in subsequent proceedings. It appears from the facts as stated in the special case that on May 31, 1912, the superintending architect, in pursuance of the powers conferred upon him by the London Building Act, 1894, issued his certificate whereby he defined the general line of buildings on the south side of the Euston Road between Southampton Street and Fitzroy Street with reference to a certain building site, No. 353, Euston Road. The owner of an adjacent building deeming himself aggrieved by the decision of the architect appealed to the appeal tribunal, and on the hearing of the appeal the question arose as to whether the point which the London County Council, who are the appellants in this Court, but who were the respondents before the appeal tribunal, desired to take in support of the architect's certificate had not already been decided adversely to their contention by an order of the tribunal made on March 12, 1897. If the appellants are precluded from now raising the question

(1) (1888) 21 Q. B. D. 313, 319. (2) [1915] A. C. 947.

whether the general building line as defined by that order was rightly defined, then this appeal fails on the first point.

The question involved is mainly one of jurisdiction. It is not contended for the appellants that this Court ought to decide the question of fact as to what is the general building line, but what is said is that the existence of the order of March 12, 1897, does not preclude the appellants from raising that question and that the case ought to be remitted to the appeal tribunal for the question of fact to be decided by the tribunal. I agree that if we were to adopt the contention of the appellants it would not be for this Court to determine the questions which would then arise; the case would have to go back to the tribunal of appeal. The substantial point, therefore, is whether the order of the appeal tribunal of March 12, 1897, is conclusive against the appellants as to the general building line in this portion of the Euston Road. The appellants contend that that order is a mere nullity because it was made without jurisdiction. It therefore becomes necessary to consider in the first place whether the decision given by the appeal tribunal in March, 1897, was one of fact or was a decision of law from which there was an appeal. What happened was this. On February 6, 1897, the superintending architect gave his certificate defining the general building line of the portion of the Euston Road which lies between Southampton Street and Fitzroy Street. The superintending architect is an independent official appointed under s. 136 of the London Building Act, 1894, and it is his duty to define the general line of buildings in any street by issuing a certificate. By s. 25 any person deeming himself aggrieved by the certificate may appeal to the tribunal of appeal. Notice of appeal against the certificate of February 6, 1897, was given, and the case came before the tribunal of appeal in March, 1897. The tribunal of appeal is appointed under s. 175 of the Act, and it is manifest from that section that Parliament intended that the members of the tribunal should be specially selected persons and that no member of the London County Council should be a member of it. Under s. 183 the tribunal has power to hear and determine appeals referred to them under the Act, and to hear parties interested, to hear and receive evidence, and to require the production of documents; and the tribunal may confirm or reverse or vary any decision and make any such order as it thinks fit.

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I read that section as conferring very wide powers upon the tribunal. The tribunal by its order of March 12, 1897, varied the certificate of February 6, 1897, by altering the position of the general building line and by extending it beyond Fitzroy Street to Tottenham Court Road. The effect of that order is that the appeal tribunal has found that the general building line on the south side of the Euston Road is from Southampton Street to Tottenham Court Road. I gather that the view of the tribunal was that in determining the general building line it was not sufficient to deal only with that portion of the Euston Road which lay between Southampton Street and Fitzroy Street, but that in order to determine the general building line it was necessary to deal with so much of the Euston Road as lay between Southampton Street and Tottenham Court Road. It is contended that that decision was ultra vires, or, at any rate, that it was beyond the jurisdiction of the tribunal, because by so doing the tribunal had decided the facts, upon which its jurisdiction was to be exercised, in such a way as to give itself jurisdiction, and that if the tribunal had done that, and if in truth the facts were not as the tribunal had found them to be, its finding of fact could be questioned in order to determine whether the tribunal had or had not the jurisdiction which it professed to have exercised.

I agree with the statement of the proposition as put by Mr. Upjohn that we have to determine whether or not the finding of fact, if it be a finding of fact, of the appeal tribunal is final and conclusive. It is true that the Act does not in terms say that the decisions of the tribunal are to be final; but when one finds that the Act has constituted a special tribunal of experts to deal with these questions of building lines it is very difficult to resist the conclusion that it was intended that the tribunal's decisions on questions of fact were to be final, and that questions of law only were to be the subject of appeal to this Court as provided by s. 182.

I am of opinion that the question which the appeal tribunal decided in 1897 was not a question of law but of fact, and the question is whether that finding of fact is final and conclusive. That depends upon the construction to be placed on the Act and must be determined according to the principles laid down by Lord Esher M.R. in *Reg.* v. *Commissioners for Special Purposes of the*

Income Tax (1), which were applied by this Court in *Rex* v. *Bloomsbury Income Tax Commissioners*. (2) The point did not arise in the same way in those cases as it does in this case, but the principle which has to be applied to the construction of this Act is the same, and the question is whether on the true construction of the sections constituting the appeal tribunal the finding of fact by the appeal tribunal, which it is necessary to find in order to give the tribunal jurisdiction to make an order, was intended to be final and conclusive. The conclusion which I have come to is that the finding of fact by the appeal tribunal is final and conclusive and cannot be questioned in any subsequent proceedings. It has not been contended that there was no evidence on which the tribunal could find as it did in 1897. That would be a question of law which could have been raised in 1897 by a case stated under s. 182. When one has once arrived at the conclusion that Parliament intended that all questions of fact, upon which the tribunal's jurisdiction is based, are to be finally and conclusively determined by the tribunal, then when the necessary facts have been found the jurisdiction of the tribunal to act arises. That being so, it is not within the power either of the tribunal or of this Court to reopen in these proceedings the question of fact as to the general building line as found by the tribunal in 1897.

Even if I had come to the opposite conclusion, I should have had great difficulty in holding that the tribunal had exceeded its jurisdiction in 1897, because I cannot find either in the certificate of the superintending architect or in the order of the tribunal any clear evidence that the decision of the tribunal in 1897 turned on the question whether the particular number of houses dealt with by the superintending architect formed a row or block of houses. The question which the appeal tribunal had to determine was whether the finding of the superintending architect as to what was the general building line was correct, and in deciding that question the tribunal could take into consideration either the whole or part of the street or of a row of houses. Sect. 22 of the Act provides that "no building or structure shall without the consent in writing of the Council be erected beyond the general line of buildings in any street or part of a street place or row of houses in which the same

(1) 21 Q. B. D. 319. (2) [1915] 3 K. B. 768, 782.

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is situate." That means that a building must not be erected beyond the general building line in any street, but, in order that the effect of that provision might not be too wide, it is not necessary that the general building line should be determined as for the whole length of the street, but it may be confined to a part of the street or to a particular row of houses. Sect. 24, which deals with the notice to be given of the architect's certificate, speaks not only of a row of houses but also of a block. In my opinion it is a question of fact for the tribunal of appeal whether a particular number of houses, situated as they are, form a row or block, and whether a row or block ends at some particular spot. It must be in each case a question of degree depending on all the circumstances, and the decision of the tribunal on this question of fact is final and conclusive. This disposes of the first point.

Next it is said that the appeal tribunal had no jurisdiction to make the order of March 12, 1897, defining the general building line in the Euston Road between Southampton Street and Tottenham Court Road, and that the case ought to have been remitted to the superintending architect for him to find what was the general building line in that part of the Euston Road. The argument is ingenious, but I think that it does some violence to the language of the Act. The argument is founded on s. 24, which provides that after the superintending architect has issued his certificate "defining the general line of buildings in any street or part of a street place or row of houses" he shall cause a notice of his certificate to be served on, amongst others, "the owners of the houses in the same block or row within a distance not exceeding fifty yards on either side of the building or land to which the certificate relates." It is to be observed that that provision does not touch the question of the jurisdiction of the appeal tribunal, but is merely directory as to the notices to be given so as to bring the fact of the issue of the certificate to the knowledge of the parties specified; but it would be going a very long way to infer that, because the notice has to be given to persons within a limited area, the appeal tribunal has no jurisdiction to make an order defining the general building line beyond that limited area. Sect. 183, which I have already referred to, gives the appeal tribunal the widest powers; but the section nowhere says that the tribunal is to remit the case to the

superintending architect, and it would in my opinion be most unreasonable to require it to do so, because if the appeal tribunal, which is, as I have pointed out, a body of experts, is not in a position when it has all the facts before it to make an order defining a general building line, it is difficult to see for what purpose this tribunal of experts was created. The scheme of the Act is that in the first place the general building line is to be defined by the superintending architect. An appeal lies from his decision to the appeal tribunal, and the tribunal's decision on the facts is final.

We are confirmed in this decision on the first two points by the judgments of Wills and Kennedy JJ. in *In re London County Council* (1), where the same view was expressed. As we are of opinion that the appeal tribunal was precluded from reopening the decision of the tribunal given in 1897, it follows that the tribunal was right in declining to receive evidence which was tendered for the purpose of showing that the general building line was not that which the appeal tribunal had in 1897 defined it to be.

For these reasons I am of opinion that the decision of the appeal tribunal was right and that this appeal fails.

Ridley J. I entirely agree, and I only wish to say a few words with regard to the contention that the appeal tribunal in 1897 was only entitled to define the building line of the block of houses between Southampton Street and Fitzroy Street, and that it exceeded its jurisdiction because in defining the general building line it took into consideration that part of the Euston Road which extends beyond Fitzroy Street as far as the Tottenham Court Road. The words in s. 22 are that "no building or structure shall . . . . be erected beyond the general line of buildings in any street or part of a street place or row of houses." The section does not say that the general building line is to be defined solely with regard to the particular requirements or position of the building in question. It is left entirely to the discretion of the superintending architect and of the tribunal of appeal to consider whether in defining the general line of buildings they should deal with the whole street or a part of it, or the row of houses in which the building in question is situate. They may consider not only the line of frontages of one

(1) 91 L. T. 501.

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Ridley J.

particular part of the street or of one row of houses, but of other parts of the street and all the other circumstances of the case, and after considering all these matters they may define the general line of building for each particular block of houses. It is said that this view is contrary to the decision of the House of Lords in *Barlow* v. *Kensington Vestry*. (1) I do not think that is so, for the decision in that case was that there was no general building line affecting the house in question. I should be very sorry if it were necessary to hold that the powers and discretion of the appeal tribunal had to be limited in the manner contended for by the appellants.

Low J. The appellants contend that this case should be remitted to the appeal tribunal in order that they may have an opportunity of proving that there is a block or row of houses in the Euston Road between Southampton Street and Fitzroy Street which has a different general building line from the rest of the street. That is a pure question of fact, and the finding of fact by the appeal tribunal in 1897 is directly to the contrary. The tribunal decided in that year that there was a general building line from Southampton Street to Tottenham Court Road and that there was no general building line peculiar to that part of the Euston Road which lies between Southampton Street and Fitzroy Street. That is a finding of fact with which this Court cannot interfere.

With regard to the other points, I entirely agree with what has been said by my Lord and Ridley J., and I also desire to express my concurrence with the judgments delivered by Wills and Kennedy JJ. in *In re London County Council*. (2)

Appeal dismissed.

Solicitor for appellants : *Edward Tanner.*
Solicitor for respondent : *E. H. Galsworthy.*

NOTE.—London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 22 : "(1.) No building or structure shall without the consent in writing of the Council be erected beyond the general line of buildings in any street or part of a street place or row of houses in which the same is situate in case the distance of such line of buildings from the highway does not

(1) 11 App. Cas. 257. (2) 91 L. T. 501.

exceed fifty feet or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet notwithstanding there being gardens or vacant spaces between the line of buildings and the highway. Such general line of buildings shall if required be defined by the superintending architect by a certificate such certificate to be issued within one month from the date of the application therefor."

Sect. 24: "The superintending architect shall within fourteen days after the issue of the certificate defining the general line of buildings in any street or part of a street place or row of houses cause a notice of his certificate to be served on the local authority and . . . . on the owner of the houses in the same block or row within a distance not exceeding fifty yards on either side of the building or land to which the certificate relates or where there is no such block or row upon the owner of the adjoining land on either side of the building or land to which the certificate relates. . . . ."

Sect. 25: "The local authority or any person deeming himself aggrieved by the certificate of the superintending architect may appeal to the tribunal of appeal."

Sect. 183: "The tribunal of appeal shall subject to the provisions of this Act have jurisdiction and power to hear and determine appeals referred to them under this Act.

"For all the purposes of and incidental to the hearing and determination of any appeal the tribunal shall subject to any rules of procedure duly made have power to hear the Council and the parties interested either in person or by counsel solicitor or agent as they may think fit and to administer oaths and to hear and receive evidence and to require the production of any documents or books and to confirm or reverse or vary any decision and make any such order as they think fit and the costs of any of the parties to the appeal including the Council shall be in the discretion of the tribunal."

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June 26, 27, 28, 29; *July* 17, 18.

[KING'S BENCH DIVISION AND COURT OF CRIMINAL APPEAL.]

THE KING *v.* CASEMENT.

Criminal Law—High Treason—Adhering to the King's Enemies—Adherence without the Realm—Aid and Comfort—Treason Act, 1351 (25 *Edw.* 3, *stat.* 5, *c.* 2).

By the Treason Act, 1351, it is declared that if a man do levy war against our Lord the King in his realm, or be adherent to the enemies of our Lord the King in the realm, giving to them aid or comfort in his realm or elsewhere, and thereof be probably attainted of open deed, that ought to be adjudged treason:—

Held by the Court of Criminal Appeal, affirming the King's Bench Division, that if a British subject be adherent to the King's enemies in his realm by giving to them aid or comfort in his realm, or if he be adherent to the King's enemies elsewhere by giving them aid or comfort elsewhere, he is equally adherent to the King's enemies, and if he is adherent to the King's enemies he commits treason as defined by the Act.

Held by the King's Bench Division, that if a British subject does an act which strengthens or tends to strengthen the enemies of the King in the conduct of a war against the King, or which weakens or tends to weaken the power of the King and of the country to resist or attack the enemies of the King and country, he gives aid and comfort to the King's enemies within the meaning of the Act.

Therefore, the United Kingdom being at war with the Empire of Germany, where a British subject went to Germany and there endeavoured to persuade other British subjects, who were prisoners of war in Germany, to join the armed forces of the enemy, and took part in an attempt to land arms and ammunition in Ireland for the use of the enemy:—

Held by the King's Bench Division and by the Court of Criminal Appeal, that he was guilty of high treason.

Held, also, that he could be tried in this country.

TRIAL at bar for high treason.

The indictment charged Sir Roger Casement with "high treason by adhering to the King's enemies elsewhere than in the King's realm, to wit, in the Empire of Germany, contrary to the Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2)." (1) It proceeded to allege that

(1) The Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2): "Auxint prceo q̃ div̊ses opinions ount este einz ces heures qeu cas, q^{a}nt il

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"Sir Roger David Casement, otherwise known as Sir Roger Casement, Knight, on December 1, 1914, and on divers other days thereafter and between that day and April 21, 1916, being then, to wit, on the said several days, a British subject, and whilst on the said several days an open and public war was being prosecuted and carried on by the German Emperor and his subjects against our Lord the King and his subjects, then and on the said several days traitorously contriving and intending to aid and assist the said enemies of our Lord the King against our Lord the King and his subjects, did traitorously adhere to and aid and comfort the said enemies in parts beyond the seas without this realm of England, to wit, in the Empire of Germany."

Overt acts were alleged, namely, on December 31, 1914, and January 6 and February 19, 1915, of soliciting and inciting and endeavouring to persuade certain persons being British subjects

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avient doit estre dit treson, & en quel cas noun, le Roi a la requeste des Seignrs & de la Cõe, ad fait declarissement q̃ ensuit, cest assavoir; qnt hõme fait compasser ou ymaginer la mort nr̃e Seignr le Roi, ma dame sa compaigne, ou de lour fitz primer & heir; . . . . & si hõme leve de guerre contre nr̃e dit Seignr le Roi en son Roialme, ou soit aherdant as enemys nr̃e Seignr le Roi en le Roialme, donant a eux eid ou confort en son Roialme ou ꝑ aillours, & de ceo ꝓvablement soit atteint de oṽt faite ꝑ gentz de lour condicion: . . . . et fait a entendre qen les cases suisnomez doit estre ajugge treson q̃ sestent a nr̃e Seignr le Roi & a sa roial majeste; & de tiele maṉe de treson la forfait e des eschetes apꝑtient a nr̃e Seignr le Roi, si bien des tres & teñz tenuz des auṭs, come de lui meismes . . . ."

TRANSLATION.

"Item, whereas divers opinions have been before this time in what case treason shall be said, and in what not; the King, at the request of the Lords and of the Commons, hath made a declaration in the manner as hereafter followeth, that is to say; When a man doth compass or imagine the death of our Lord the King, or of our Lady his Queen or of their eldest son and heir; . . . . or if a man do levy war against our Lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere, and thereof be probably attainted of open deed by the people of their condition: . . . . And it is to be understood, that in the cases above rehearsed, that ought to be adjudged treason which extends to our Lord the King, and his royal majesty: and of such treason the forfeiture of the escheats pertaineth to our Sovereign Lord, as well of the lands and tenements holden of other, as of himself . . . ."

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and members of the military forces of the King and being prisoners of war then imprisoned at Limburg Lahn Camp, in the Empire of Germany, to wit, Michael O'Connor, John Richardson, John Cronin, John Robinson, William Egan, Daniel O'Brien, James Wilson, and others whose names were unknown, to forsake their duty and allegiance to the King and to join the armed forces of his enemies and to fight against the King and his subjects in the said war. Also in or about the months of January and February, 1915, at Limburg Lahn in the Empire of Germany circulating and distributing and causing and procuring to be circulated and distributed to and amongst certain persons being British subjects and members of the military forces of the King and being prisoners of war imprisoned at Limburg Lahn Camp aforesaid, to wit, Michael O'Connor, John Robinson, John Cronin, William Egan, Daniel O'Brien, James Wilson, and divers others whose names were unknown, a certain leaflet to the tenor and effect following, that is to say :

"IRISHMEN ! Here is a chance for you to fight for Ireland ! You have fought for England, your country's hereditary enemy. You have fought for Belgium in England's interest, though it was no more to you than the Fiji Islands ! Are you willing to fight FOR YOUR OWN COUNTRY with a view to securing the national freedom of Ireland ?

"With the moral and material assistance of the German Government an IRISH BRIGADE is being formed. The object of the Irish Brigade shall be to fight solely for THE CAUSE OF IRELAND and under NO CIRCUMSTANCES shall it be directed to any GERMAN end. The Irish Brigade shall be formed and shall fight under the Irish flag alone. The men shall wear a special distinctively Irish uniform, and have Irish officers. The Irish Brigade shall be clothed, fed, and efficiently equipped with arms and ammunition by the German Government. It will be stationed near Berlin and be treated as guests of the German Government. At the end of the war the German Government undertakes to send each member of the brigade who may so desire it to the United States of America with necessary means to land.

"The Irishmen in America are collecting money for the brigade.

"Those men who do not join the Irish Brigade will be removed

from Limburg and distributed among other camps. If interested, see your company commanders.

"Join the Irish Brigade and win Ireland's independence!

"Remember Bachelor's Walk!

"God save Ireland!"

with intent to solicit, incite, and persuade the said last-mentioned British subjects, being Irishmen, to forsake their duty and allegiance to the King and to aid and assist his enemies in the prosecution of the said war against the King and his subjects.

Other overt acts alleged were—

(i.) On or about December 31, 1914, and on divers days thereafter in the months of January and February, 1915, persuading and procuring certain persons, being members of the military forces of the King, to wit, Daniel Julian Bailey, one Quinless, one O'Callaghan, one Keogh, one Cavanagh, one Greer, and one Scanlan, and divers others, whose names were unknown, to the number of about fifty, the said persons being prisoners of war then imprisoned in Limburg Lahn Camp in the Empire of Germany, to forsake their allegiance to the King and to join the armed forces of his said enemies with a view to fight against the King and his subjects in the said war.

(ii.) On or about April 12, 1916, setting forth from the Empire of Germany as a member of a warlike and hostile expedition undertaken and equipped by the enemies of the King having for its object the introduction into and landing on the coast of Ireland of arms and ammunition intended for use in the prosecution of the war by the said enemies against the King and his subjects.

At the conclusion of the evidence for the prosecution,

A. M. Sullivan (Serjeant and King's Counsel of the Irish Bar) and *Artemus Jones*, for the prisoner, moved to quash the indictment. The indictment charges the prisoner with "adhering to the King's enemies elsewhere than in the King's realm, to wit," &c., "contrary to the Treason Act, 1351." No such offence is created by the words of that Act. The offence there specified is if a man "be adherent to the enemies of our Lord the King within the realm." The words "within the realm" are of vital importance. In the fourteenth century many of the English barons by holding lands in France were subjects of the French King as well

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as of the English King. If the two Kings were at war with each other these "amphibious barons" must fight for their liege lord and send a due contingent of knights to the opposite army. (1) If adhering to the King's enemies without the realm were treason, these barons by rendering service to the French King would be in danger of forfeiting their lands in England. It would be to their interest to exclude from punishment all cases of adhering to the King's enemies outside the realm and to confine treasonable adherence to cases of adhering within the realm. Their influence in Parliament would be used to protect their interests.

Still more cogent is the fact that no crime committed outside the body of a county was cognizable by the common law. "If a man be stricken upon the high sea, and dies of the same stroke upon the land; this cannot be inquired of by the common law, because no visne can come from the place where the stroke was given (tho' it were within the sea pertaining to the realm of England, and within the liegeance of the King) because it is not within any of the counties of the realm." (2) "If two of the King's subjects go over into a foreign realm, and fight there, and the one kills the other, this murder being done out of the realm, cannot be for want of trial heard and determined by the common law, but it may be heard and determined before the Constable and Marshal." (3) "So if A. gives B. a mortal wound in a foreign country, B. comes into England and dies; this cannot be tried by the common law, because the stroke was given there, where no visne can come . . . . " (4) And before the statute of 2 & 3 Edw. 6, c. 24, if one man struck another in one county and the injured man came into another county and died there, an indictment would not lie against the aggressor. (5) For "every indictment at common law must expressly show some place wherein the offence was committed, which must appear to have been within the jurisdiction of the Court, in which the indictment was taken; for if . . . . the stroke be alleged at A. and the

(1) Pollock and Maitland, Hist. Eng. Law, vol. 1, pp. 443, 444 (460, 2nd ed.), citing Bracton, fol. 427b.

(2) Vin. Abr. Trial (N. b. 4), pl. 1, p. 178.

(3) Vin. Abr. Trial (N. b. 5), pl. 2, p. 180, citing 3 Inst. 48.

(4) Vin. Abr. Trial (N. b. 5), pl. 2, note, p. 180.

(5) Vin. Abr. Trial (Y. a. 2), pl. 2, 3, p. 130.

death at B. and the indictment conclude that the defendant sic felonice murdravit the deceased at A. the indictment is void; so is it also if it lay not both a place of the stroke and death; or if any place so alleged be not such from whence a visne may come . . . . " (1) The limits of the common law jurisdiction in the time of Edward III. are matter of history. Offences committed outside the body of a county were not cognizable by the common law. The Admiral could try offences, including treason, committed on the high seas or below the bridges of the great rivers. Such a trial would be according to the civil law and not the common law. The Constable and Marshal could try treasons committed within the territory of a foreign prince. He tried such offences by appeal of treason and wager of battle. In the reign of Richard II. the Court of the Constable and Marshal was encroaching upon the jurisdiction of the King's Courts. To remedy this an Act was passed in the year 1389, 13 Ric. 2, stat. 1, c. 2, declaring that to the Constable it pertained to have cognizance of contracts touching deeds of arms and of war out of the realm, and also of things that touch war within the realm which could not be determined nor discussed by the common law, with other usages and customs to the same matters pertaining which other Constables theretofore had duly and reasonably used in their time; and it was enacted that if any should complain that any plea was commenced before the Constable and Marshal that might be tried by the common law of the land, the plaintiff should have a privy seal from the King directed to the Constable and Marshal to surcease in that plea until it was discussed by the King's Council if the matter ought of right to pertain to that Court, or otherwise to be tried by the common law of the realm of England. In the year 1399 it was enacted by the statute 1 Hen. 4, c. 14, that all appeals to be made of things done within the realm should be tried and determined by the good laws of the realm made and used in the time of the King's progenitors; and that all appeals to be made of things done out of the realm should be tried and determined before the Constable and Marshal. Consistently with this, when a statute of 1414, 2 Hen. 5, stat. 1, c. 6, created offences of treason by acts done outside the realm, it also provided a tribunal whereby to try them, consisting of a conservator

(1) Vin. Abr. Indictment (H. 8), pl. 5, pp. 376, 377.

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and two men learned in the law, who were to try these treasons according to the practice prevailing in trials before the Admirals of the Kings of England.

In the reign of Henry VIII. for dynastic and other purposes a great accession was made by statute to the number of treasons. The statute 25 Hen. 8, c. 22, is an example of this legislation; 26 Hen. 8, c. 13, is another. A number of these newly-made treasons consisted of acts which might be committed abroad. The last mentioned Act, 26 Hen. 8, c. 13, dealt with them. It provided that those treasons committed abroad should be triable here as treason committed within the realm were triable. It enacted that "If any of the Kinges subjectȩ, denisens or other, do commytte or practyse, oute of the lymettȩ of this realme yn any oute warde ptyes, any suche offences whiche by this Acte are made or heretofore have be made treasonne, that then suche treasons, what so ever they be or where so ever they shall happen so to be donne or commytted, shalbe inquyred and presentyd, by the othes of twelve goode and laufulle men upon good and probable evydence and wytnesse, yn suche shyre and countie of this realme and before such psonnes as hit shall please the Kynges Highnes to appoynte by cōmyssion under his greate seale, yn lyke maner and fourme as treasons commytted within this realme have byn used to be inquyred of and presentyd; and that uppon everie ynditement and presentment founden and made of any suche treasons, and certyfied ynto the Kynges Bench, lyke pcese and other circumstānce shalbe there had and made ayenst the offendours as yf the same treasons so presentyd had be laufully founde to be donne and commytted within the lymytes of this realme; . . . ." That statute, which is repeated in 5 & 6 Edw. 6, c. 11, s. 4, in force at the present day, is the foundation of the law of foreign treasons. It does not include adhering to the King's enemies without the realm, for that was not by that Act or theretofore made treason.

It is stated by Sir Matthew Hale (1) that before the statute of 26 Hen. 8, c. 6, no treason, murder, or felony committed in Wales was inquirable or triable before commissioners of oyer and terminer, or in the King's Bench in England, but before justices or commissioners assigned by the King in those counties of Wales where the

(1) 1 Hale, P. C. 156.

fact was committed. He cites the case of *John Kynaston* (1), who was charged with certain felonies committed in Shropshire and also as an accessory to the treason of compassing the King's death in Wales in having sent his son fully armed to assist Owen Glendower at Oswestry in his rebellion. He was indicted in Shropshire and the indictment was returned into the Court of King's Bench at Westminster. But, inasmuch as treasons in Wales were not triable by the laws of England, he was tried only for the felonies alleged to have been committed in Shropshire. Of these charges he was acquitted. This is one of many instances which show that treasons committed without the realm could only be tried by a special statutory provision.

The next statute to be noticed is 28 Hen. 8, c. 15. It treats of treasons, piracies, and other offences committed upon the high seas. It recites that whereas traitors, pirates, thieves, robbers, murderers, and confederators upon the sea many times escaped unpunished "because the triall of their offences hath heretofore ben ordered judged and determyned before the Admyrall or his lyeutenante or cōmissary, after the course of the civile lawes, the nature wherof is that before any judgement of death canne be yeven ayenst the offendours, either they must playnly confesse their offences (which they will never doo without torture or paynes) or els their offences be so playnly and directly ꝓved by witnes indifferente, suche as sawe their offences cōmytted, which cannot be gotten but by chaunce at fewe tymes by cause such offendours cōmytt their offences uppon the see, and at many tymes murder and kill suche ꝑsons being in the shipp̄ or bote where they cōmytt their offences which shulde wytnes ayenst them in that behalfe"; and proceeds to enact: "For reformacion wherof be it enacted," &c., "that all treasons . . . . herafter to be cōmytted in or uppon the see, or in any other haven ryv̄e creke or place where the Admyrall or Admyralls have or ꝑtende to have power auctoritie or jurisdiction, shall be enquired tried harde determyned and judged in such shires and places in the realme as shall be lymytted by the Kynges cōmission or cōmissions to be directed for the same, in like fourme and condicion as if any such offence or offences hadd ben cōmytted or done

(1) (1401) Coram Rege Roll Pasch. 2 Hen. 4 Rex, memb. 18, in the Public Record Office.

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in or uppon the lande ; And such cōmissions shall be hadd under the Kinges greate seale directed to the Admyrall or Admyrals, or to his or their lieutenaunt deputie or deputies, and to three or four such other substanciall ꝑsons as shall be named or appoynted by the Lorde Chauncellour of Englande for the tyme being from tyme to tyme and as often as nede shall require, to here and determyne suche offences after the cōmon course of the lawes of this lande, used for tresons . . . . done and cōmytted upon the lande within this realme." Coke treating of Piracy (1) says : "Note, treason done out of the realm is declared to be treason by the statute 25 Edw. 3, and yet at the making of this Act of 28 Hen. 8 it wanted trial (as by the preamble of this statute it is rehearsed) at the common law."

Now the Act of 26 Hen. 8, c. 13, had provided for the inquisition and presentment of foreign treasons under the King's commission, not by the common process of the realm. This was considered objectionable, and accordingly the Act of 35 Hen. 8, c. 2, was passed. This Act recites : "Forasmuche as some doubtes and questions have bene moved, that ꝯten kindes of treasons mysprisions and concealmentꝭ of treasons, done ꝑpetrated or cōmytted out of the Kingꝭ Majesties realme of Englande and other his Graces Dnions, cannot ne maye by the cōmon lawes of this realme be enquired of herd & determyned within this his saide realme of Englande ; for a playne remedye ordre and declarcōn therein to be had and made, be it enacted by auctoritie of this ꝑsent parliament, that all manner of offences being alredye made or declared, or hereafter to be made or declared by any the lawes and statutꝭ of this realm, to be treasons mysprisions of treasons or concealmentꝭ of treasons, and done ꝑpetrated or cōmytted or hereafter to be done ꝑpetrate or cōmitted by anye ꝑson or ꝑsons out of this realme of Englande, shalbe from hensforth inquired of herd and determyned before the Kingꝭ justicꝭ of his Benche for plees to be holden before himselfe, by good and laufull men of the same shire where the saide Benche shall sytt and be kepte, or els before suche cōmissioners and in suche shire of the realme as shalbe assigned by the Kinges Majesties cōmission, and by good and laufull men of the same shire ; in like manner and forme to all ententꝭ and purposes as if suche treasons mysprisions of treasons or concealmentꝭ of

(1) 3 Inst. 113.

treasons had bene done ppetrated and cōmytted within the same shire where they shalbe so inquired of harde & determyned as is aforesaid." Again, adhering to the King's enemies without the realm is not included in this statute, since such adherence was not already or afterwards made or declared to be treason.

All those treasons newly created in the reign of Henry VIII. were swept away by an Act of 1553, 1 Mar., sess. 1, c. 1, which provided that no act, deed, or offence being by Act of Parliament made treason by words, writing, cyphering, deeds, or otherwise should be taken or adjudged to be high treason, but only such as were declared and expressed to be treason by the Act of 25 Edw. 3, and none other. (1) And by an Act in the next year, 1 & 2 Ph. & Mar. c. 10, s. 6, it was enacted that all trials to be had, awarded, or made for any treason should be had and used only according to the due order and course of the common laws of this realm and not otherwise. This statute raised a doubt in the minds of the judges in the year 1555 "because no offence of treason committed out of the realm was triable here by the course of the common law." The judges (2) decided that the course of the common law included the procedure indicated by the Act of 35 Hen. 8, c. 2, but not that authorized by an Act of 33 Hen. 8, c. 23, whereby a treason committed in one county could be tried in another.

After 1 & 2 Ph. & Mar. c. 10 there were passed various statutes making treasons committed abroad triable in England. Among them were 13 Car. 2, stat. 1, c. 1; 9 Will. 3, c. 1; 13 & 14 Will. 3, c. 3; 1 Ann. stat. 2, c. 21 (c. 17 in the common printed editions); 3 & 4 Ann. c. 13 (c. 14 in other editions). (3) All these statutes prescribe the mode of trial. The inference is that without a special enactment in that behalf treason committed abroad was not triable at all, and therefore was not a crime.

To come now to the authorities: Lord Coke, dealing with the

(1) This had been done once before by an Act of 1 Hen. 4, c. 10, which recited that in 21 Ric. 2 "divers pains of treason were ordained by statute, in as much that there was no man which did know how he ought to behave himself, to do, speak, or say, for doubt of such pains."

(2) See Dyer, 131b, 286b.

(3) Other statutes are 13 Eliz. c. 1 and 17 Geo. 2, c. 39, but *semble* these treasons were all triable in England by 35 Hen. 8, c. 2.

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several classes or heads of high treason, says (1): "The fourth is adhering to the King's enemies within the realme, or without, and declaring the same by some overt act"; and again, explaining the word "adherent," he says (2): "This is here explained, viz. in giving aide and comfort to the King's enemies within the realme or without: delivery or surrender of the King's castles or forts by the King's captaine thereof to the King's enemie within the realme or without for reward, &c., is an adhering to the King's enemy, and consequently treason declared by this Act." In support of this statement he cites numerous authorities in the margin. (3) None of them supports the view that adherence without the kingdom is treason within the meaning of the Act. Some of them were petitions in Parliament to be restored to the possession of lands forfeited by the treason of the petitioner's predecessor; others were impeachments in Parliament of military officers for surrendering castles and cities in France or Flanders. Of the cases cited from the Year Books, one, namely, 8 Edw. 3, 20, is in favour of the prisoner, in so far as a case before the Act can be an authority. The others are equivocal. On the words "ou par ailors" he says (4): "That is to say, out of the realme of England. But then it may be demanded, how should at this time this foraigne treason be tried? And some of our books doe answer, that the offender shall be indicted and tried in this realme where his land lyeth, and so it was adjudged in 2 Hen. 4." There is a reference in the margin to the Coram Rege Roll Pasch. 2 Hen. 4, Rot. 8, Wallia. This seems to be *John Kynaston's Case*, cited above, and if so it is no authority for the position in support of which it is cited. The same may be said of the other authorities cited. The nearest approach to an authority among them is 5 Ric. 2, Trial 54 (5), but that is merely the argument of Bealknap, who was the King's Attorney. (6)

Sir Matthew Hale says (7): "If an Englishman during war

(1) 3 Inst. 4.

(2) Ibid. 10.

(3) See note on these authorities, post, p. 144.

(4) 3 Inst. 11.

(5) This seems to be a reference to Fitzh. Abr. Trial 54.

(6) *Quaere de hoc.* According to Foss's Lives of the Judges, and the Dictionary of National Biography, Sir R. Bealknap was appointed Chief Justice of the Common Pleas in 1374 and still held that office in 5 Ric. 2 (1382).

(7) 1 Hale, P. C. 167.

between the King of England and France be taken by the French and there swear fealty to the King of France, if it be done voluntarily, it is an adhering to the King's enemies; but if it be done for fear of his life, and that he returns, as soon as he might, to the allegiance of the Crown of England, this is not adherence to the King's enemies within this Act." In support of this the author cites the Close Roll 7 Edw. 3. (1) He continues: "Tho' this was before 25 Edw. 3, yet the instance is useful, because adhering to the King's enemies was then treason." The instance may be useful, but the Close Roll of 7 Edw. 3 can be no authority for the construction of a statute of 25 Edw. 3. He proceeds (2): "If a captain or other officer, that hath the custody of any of the King's castles or garrisons, shall treacherously by combination with the King's enemies, or by bribery or for reward deliver them up, this is adherence to the King's enemies." As authority for this is cited "the case of William Weston for delivering up the castle of Oughtrewicke, and John de Gomeneys for delivering up the castle of Ardes in France, both which were impeached by the Commons, and had judgment of the Lords in Parliament . . . ." (3)—namely, William Weston to be drawn and hanged, but execution was respited; and execution was respited in the second case. The passage continues: "And note, though the charge were treason, and possibly the proofs might probably amount to it, and Walsingham sub anno 1 Ric. 2 tells us it was done by treason; yet the reason expressed in the judgment against Weston is only que surrendists le dit castle de Oughtrewicke al enemies nostre Seigneur le Roy avant dits sans nul duresse ou defalt de victualls contre vous ligeance & emprise: and the like reason is exprest in the judgment against Gomeneys . . . ." The author continues (4): "The truth is, if it were delivered up by bribery or treachery, it might be treason, but if delivered up upon

(1) The case of *John de Culewen* (1333), Close Roll 7 Edw. 3, memb. 15, May 13, Fenham, whose lands had been seized into the hand of the King on the ground that he had joined the Scots. Afterwards it was found that he had been taken prisoner of war by the Scots and detained in prison in Scotland, and that to save his life he remained in the faith of the Scots for half a year and then returned to England and had been in the King's faith ever since. The King's hand was amoved from the lands.

(2) 1 Hale, P. C. 168.

(3) (1377) Rot. Parl. 1 Ric. 2, numb. 40.

(4) 1 Hale, P. C. 169.

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cowardice or imprudence without any treachery, though it were an offense against the laws of war, and the party subject to a sentence of death by martial law, as it once happened in a case of the like nature in the late times of trouble, yet it is not treason by the common law, unless it was done by treachery; but tho' this sentence was given in terrorem, yet it was not executed: it seems to be a kind of military sentence, though given in Parliament." This passage stands self-condemned as an authority on the construction of the statute in question. Further on there is this: "Touching the trial of foreign treason, viz., adhering to the King's enemies, as also for compassing the King's death without the kingdom at this day, the statutes of 35 Hen. 8, c. 2, hath sufficiently provided for it" (1); "but at common law he might have been indicted in any county of England, and especially where the offender's lands lie, if he have any." In support of that the author cites 5 Ric. 2, Trial 54 (2), where there is indeed the statement of counsel to that effect but no decision by the Court. (3)

Then there is a passage in Hawkins' Pleas of the Crown (4): "It seems to have been a great doubt (5) before the making of the statute of 35 Hen. 8, c. 2, in what manner and in what place high treason done out of the realm was to be tried. For some seem to have holden, that it was triable only upon an appeal before the Constable and Marshal; others, that it might be tried upon an indictment, laying the offence in any county where the King pleased (6); and others, that it was triable by way of indictment in that county only wherein the offender had lands (7): but surely

(1) Citing Dyer, 298, 300.

(2) Fitzh. Abr. Trial 54.

(3) *Quaere.* See note (6), ante, p. 108.

(4) Hawkins, P. C., bk. 2, ch. 25, s. 48, vol. 4, p. 22 (Leach); vol. 2, p. 306 (Curwood).

(5) Citing Y. B. Hil. 19 Edw. 4, fol. 6, pl. 6, where per Neele J: "If a man who is a liege of the King be adherent to or aiding the great enemy of our Lord the King beyond the sea, how shall that matter be tried? It seems to me that it shall be tried by the country."

(6) Citing Co. Litt. 261b.

(7) Citing Hale, Pleas of the Crown, or a Methodical Summary of the Principal Matters relating to that subject (London, 1707), p. 204: "A treason done out of the land, it hath been held that it may be enquired of and tried where the offender had lands; but to avoid the question by statute 35 Hen. 8, c. 2, all treasons and misprisions, or concealments

it cannot reasonably be doubted, but that it was triable some way or other; for it cannot be imagined that an offence of such dangerous consequence, and expressly within the purview of 25 Edw. 3 should be wholly dispunishable, as it must have been, if it were no way triable." The words "high treason done out of the realm" cannot include the offence of adherence without the realm. But even if intended to do so the passage is merely speculative and not authoritative. It establishes one point only, namely, that no one knew how such a treason was to be tried.

Next it is stated in *Reg.* v. *Platt* (1) that "it was the ancient opinion, that the species of treason which consists, by 25 Edw. 3, c. 2, in adhering to the King's enemies, might be tried, before the statute 35 Hen. 8, c. 2, within the kingdom, by the rules of the common law, though the aid and comfort was afforded without the realm." The prisoner in that case was charged with "high treason at Savannah in the Colony of Georgia in North America." It does not appear in what the treason consisted. The prisoner applied for his discharge under the Habeas Corpus Act. The passage cited is merely obiter.

In *Mulcahy* v. *Reg.* (2) Willes J., in delivering before the House of Lords the opinion of the judges on the question whether a conspiracy was a sufficient overt act to support a charge of compassing to depose the Sovereign, is reported to have said that the Treason Act, 1351, made it treason to be "adherent to the King's enemies, in his realm or elsewhere." The words are printed with inverted commas as though they were a quotation from the Act. They are in truth a misquotation. But in any view the passage is no authority on the meaning of the Act: its only purport is as matter of inducement; the meaning of the statute was irrelevant to the appeal before the House.

The only decision against the prisoner is *Rex* v. *Lynch.* (3) In that case the prisoner was charged with adhering to, aiding, and comforting the Government of the South African Republic while at war with this country at Pretoria. Lord Alverstone C.J., Wills

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of treasons done out of England may be enquired heard and determined," &c.

(1) (1777) 1 Leach, 157, 168.

(2) (1868) L. R. 3 H. L. 306, 318.

(3) [1903] 1 K. B. 444; 19 Times L. R. 163.

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and Channell JJ., on the authority of *Rex* v. *Vaughan* (1), held that this was treason within the Treason Act, 1351. (2) Yet it can be demonstrated that *Rex* v. *Vaughan* (1) was a case of adhering within the realm. "If a man be upon the sea of England, he is within the kingdom or realme of England, and within the ligeance of the King of England, as of his Crowne of England. And yet altum mare is out of the jurisdiction of the common law, and within the jurisdiction of the Lord Admirall." (3) "Intra regnum, within the realm, is by the same law taken, and that in the usual phrase for that which is intra (or as it is wont to bee barbarously rendered infra) quatuor maria, within the four seas, to wit, the southern, western, eastern, and that northern sea which washeth both the sides of that neck of land, whereby Scotland is united to England." (4) "Within the four seas and within the realm signified one and the same thing." (5) "The narrow sea, adjoining to the coast of England, is part of the wast and demesnes and dominions of the King of England, whether it lie within the body of any county or not. This is abundantly proved by that learned treatise of Master Selden called Mare Clausum." (6) See also *Reg.* v. *Keyn.* (7) Treason without the realm was triable, if at all, under the Act of 35 Hen. 8, c. 2, in the King's Bench or before the King's commissioners. Treasons on the high seas were triable under 28 Hen. 8, c. 15, before a Court consisting of the judge of the Admiralty and divers other weighty persons (words which were construed to mean His Majesty's judges). The judges in *Rex* v. *Vaughan* (1) were Sir Charles Hedges, judge of the High Court of Admiralty, Holt C.J., Treby C.J., Ward C.B., Turton J., and others of His Majesty's commissioners. The prisoner was indicted for that he, "being then on the high seas within the jurisdiction of the Admiralty of England about fourteen leagues from Deal, did then and there by force of arms falsely, maliciously, and traitorously aid and help and assist the enemies of our said Lord the King." The second count charged that the prisoner as a false traitor against our said

(1) (1696) 13 How. St. Tr. 485; 2 Salk. 634.
(2) See 19 Times L. R. 173.
(3) Co. Litt. p. 260a, s. 439.
(4) Selden, Mare Clausum, translated by Nedham (ed. 1652), bk. 2, ch. 24, p. 387.
(5) Ibid. 389.
(6) Hale, De Jur. Mar., ch. 4.
(7) (1876) 2 Ex. D. 63.

Lord the King further designing war and rebellion against the said King upon the high seas within the jurisdiction of the Admiralty of England to move, stir up, and procure upon the high seas about fourteen leagues from Deal and within the dominion of the Crown of England and within the jurisdiction of the Admiralty of England aforesaid with other traitors war against the King levied and waged. It is plain, therefore, that *Rex* v. *Vaughan* (1) was a case of treason upon the high seas and therefore within the realm. Yet in *Rex* v. *Lynch* (2) Lord Alverstone C.J. treats this case as an authority that there may be treason by adherence without the realm. (3) For that proposition it is no authority at all. In short, *Rex* v. *Lynch* (2) rests upon no authority. Apart from that case there is no reliable authority for saying that adherence to the King's enemies outside the realm, much less that adherence outside the dominions, is treason. If the accused is within the realm his adherence may be proved by acts outside the realm, because it is his treachery that is the gist of his offence. A typical instance of treasonable adherence is the case of *Nicholas de Wautham* (4), who against his allegiance treacherously conspired with Guy de Montfort and Emericus his brother and Llewelyn, formerly Prince of Wales, an enemy of the King, and came to the King's Court and sojourned there as a private guest while he lay in wait and pried out the secrets of the King, and all that he could discover he betrayed to the King's enemies to whom he gave his adherence. He was properly speaking "adherent to the enemies of our Lord the King in the realm" within the words of the Act. Being within the realm the law had seisin of him. But a man who outside the dominions adheres to the enemy is outside the common law and outside the Act of Edward III. which declared it. The meaning of that statute, as of all statutes, is to be derived from the words read in their natural sense unelucidated or unobscured by the counsel of commentators however eminent. The words are "be adherent . . . . within the realm." No authority short of a judgment can compel this

(1) 13 How. St. Tr. 485; 2 Salk. 634.

(2) [1903] 1 K. B. 444; 19 Times L. R. 163.

(3) See 19 Times L. R. 173.

(4) (1285) Oxford City Documents, p. 204, cited in Pollock and Maitland, Hist. Eng. Law, vol. 2, p. 506, note 2. For other instances see 1 Hale, P. C. 78 et seq.

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Court to say that those words mean "be adherent . . . . without the realm."

J. H. Morgan, having been retained by the prisoner, but not having been assigned as one of his counsel, was heard as amicus curiae. In the case of *Rex* v. *Weldon* (1) the prisoner was charged under the Treason Act, 1351, with adhering to the King's enemies in the county of the city of Dublin and found guilty. Finucane J., in giving judgment on a motion in arrest of judgment, said (2): "At the time this statute was passed, no treason could be tried but treason within the realm, and that is the treason specified, 'giving them aid within the realm'—then are added the words 'or without' . . . . The locality is annexed to the person adhering, not to the enemy to whom he adhered."

Sir Frederick Smith, *A.-G.*, *Sir George Cave*, *S.-G.*, *Bodkin*, *Travers Humphreys*, and *Branson*, for the Crown. Not of caprice but of necessity have counsel for the defence made light of such authorities as Coke, Hale, and Hawkins. But the opinions of such lawyers are not to be brushed aside so carelessly, because, first, they are agreeable to reason, and, secondly, they are supported by authority.

It is truly said that treason consists of a breach of the duty of allegiance which the subject owes to the Sovereign and which binds him at all times and in all places. Is it probable that the law of an island realm would regard those traitors, if any, who aid and comfort the King's enemies abroad by remaining at home, and ignore that larger number who would give greater aid and comfort by joining the enemy abroad? If it were so, adherence to the King's enemies would be punishable only when the realm was invaded by a foreign Power; for the number of traitors found at home adhering to the King's enemies abroad would be negligible compared with those who would transfer themselves and their allegiance to the enemy abroad.

The argument for the defence rests on the assumption that there is only one reasonable construction of the Treason Act, 1351, namely, that the words "or elsewhere" are in opposition to the words "giving them aid or comfort within his realm." This is a false assumption. The words "or elsewhere" may with at least

(1) (1795) 26 How. St. Tr. 226. (2) Ibid. 292.

equal reason be read as in opposition to the words "be adherent to the King's enemies in the realm." In that case the words "giving them aid or comfort within his realm" are explanatory of the words "be adherent to the enemies of our Lord the King in the realm," and the passage, omitting the explanatory words, would then read "be adherent to the enemies of our Lord the King in the realm . . . . or elsewhere." This is not only a possible construction, but is in truth the only reasonable construction when it is remembered that the enemies of our Lord the King will mostly be found outside the realm. Modern rules of construction strictly applied may lead to a false interpretation of a statute of Edward III. Another reasonable construction would be to read the words "or elsewhere" as alternative both to the words "be adherent to the enemies of our Lord the King in the realm" and also to the words "giving to them aid or comfort in his realm." Indeed the words may equally apply to the levying of war against the King in his realm. Now when there are two reasonable constructions of a statute of such antiquity the opinion of Hawkins alone is conclusive ; and he says in the passage that has been quoted (1) that high treason done without the realm is "expressly within the purview of 25 Edw. 3." If he did not expressly exclude from this statement the case of adhering to the King's enemies it is to be inferred that he intended to include it. This passage begins by stating that there was great doubt before the statute 35 Hen. 8, c. 2, how and where high treason done out of the realm was to be tried. No doubt was ever expressed either by Hawkins or by any one else but that it was triable some way or other. The only doubts which had existed, namely, those as to the venue and mode of trial, were set at rest by the Act of 35 Hen. 8, c. 2.

As great reliance was placed upon the case in Dyer (2) it is necessary to explain that case. An Act of 1 & 2 Ph. & Mar. c. 10 had enacted that all trials thereafter to be had, awarded, or made, for any treasons, should be had and used "only according to the due order and course of the common laws of this realm and not otherwise." The judges were pressed by the doubt to which Hawkins refers, the doubt as to the venue and mode of trial of high treason

(1) Hawk. P. C., bk. 2, ch. 25, s. 48, vol. 2, p. 306 (Curwood); vol. 4, p. 22 (Leach).

(2) Dyer, 131b.

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done out of the realm, "because"—however else it was triable—"no offence of treason committed out of the realm was triable here by the course of the common law"—at any rate before the statute of 35 Hen. 8, c. 2. The question was as to the meaning of the words "according to the course of the common law"; did they refer to the common law before 35 Hen. 8 or the common law as modified by that statute? In other words, did the statute of 1 & 2 Ph. & Mar. c. 10 repeal or modify the Act of Henry VIII.? "And for the cause above the judges, Sir John Baker and Hare M.R. were assembled." They thought that the statute of Henry VIII. enlarged the power and authority of the trials of the realm in this point, and that "by the words above, that is to say 'according to the order and course of the common law,' it shall be intended that the trial shall be in the county where the indictment is." This was not a decision in a case, but the resolution as of a rule committee. It casts no doubt on the opinion that high treason committed abroad was triable some way or other.

To come now to the decided cases. In the case of *William de Weston* (1) it was found by Parliament that he having undertaken to keep safely the castle of Outkrewyk in Flanders wickedly delivered and surrendered it to the King's enemies without any duress or lack of victuals by his own default alone against all right and reason and against his allegiance and undertaking. By resolution of Parliament he was sentenced to be drawn and hanged. In the case of *Sir John de Gomeneys* (2), who was impeached for delivering up the castle of Ardes in France, sentence was also passed. That was treason by adhering to the King's enemies. Sir Matthew Hale mentions both these cases in the passage cited in the argument for the defence. (3) That passage is a strong authority in favour of the Crown.

The next is *Lord Wentworth's Case.* (4) Lord Wentworth, deputy of the town of Calais, Edward Grymston, controller of that town, and Ralph Chamberleyn, lieutenant of the castle of Calais, were

(1) (1377) Rot. Parl. 1 Ric. 2, nums. 38—40. See also 4 Cobb. St. Tr. 299.

(2) Rot. Parl. 1 Ric. 2, nums. 38—40; 4 Cobb. St. Tr. 303.

(3) 1 Hale, P. C. 168.

(4) (1559) Unreported: Baga de Secretis, K. B. 1 Eliz., Pouch 38, in the Public Record Office.

indicted jointly with others for that occupying and exercising various offices respectively at Calais in parts beyond the seas they were on December 20, 1558, adhering to, aiding, and comforting Henry King of the French, the public enemy of the King and Queen of this realm of England, and finding means falsely and traitorously to deprive the said King and Queen of their possession of the town of Calais and the castle of the same and deliver the same into the hands and possession of the said Henry King of the French. For the fulfilling of which false and treasonable purposes the said Henry, by their treasonable procurement, covin, and assent, sent the Duke of Guise with an army of 15,000 Frenchmen to the town of Calais to receive it, upon whose approach Chamberleyn withdrew from the castle so that the French took it, and Lord Wentworth, Grymston, and Chamberleyn offered to surrender the town and permitted the Duke of Guise to enter and take it. The indictment against Lord Wentworth was removed into the House of Lords, where he was found not guilty. (1) Grymston was tried before commissioners and found not guilty. (2) Chamberleyn was tried before the same commission, found guilty, and executed. (3) That was a case of adhering to the enemies of the King without the realm.

In *O'Rurke's Case* (4) the indictment charged that Brian O'Rurke as a false traitor against the Lady Elizabeth, Queen of England, France, and Ireland, at Dromahere in the realm of the said Lady the Queen of Ireland in parts beyond the sea, traitorously conspired and compassed to deprive, overthrow, and disinherit and put to death the Queen. It set out among other overt acts that at Dromahere and in divers other places in the realm of Ireland in parts beyond the sea he moved and procured Alexander MacConnell and Donagh MacConnell, enemies of the Queen, to levy an army to invade the realm of Ireland, and that he received, comforted, and aided the same enemies at Bradlewe in the realm of Ireland in parts beyond the seas. Further it charged that Sixtus V., late Bishop of Rome, and Philip King of Spain had prepared a great army hostilely to

(1) (1643) 4 Cobb. St. Tr. 314.

(2) Baga de Secretis, 2 Eliz. K. B., Pouch 39, file 1, in the Public Record Office.

(3) Baga de Secretis, K. B. 2 Eliz., Pouch 39, file 2, in the Public Record Office.

(4) (1591) Coram Reg. Mich. 33 & 34 Eliz., Regina Roll 15, in the Public Record Office.

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invade the realm of England, and that O'Rurke traitorously received, fed, and comforted and aided very many Spaniards, enemies of our said Lady the Queen, arriving in certain ships in the said realm of Ireland. In the fourth count it charged that O'Rurke in the realm of Ireland in parts beyond the seas traitorously aided and comforted certain rebels and traitors of the realm of Ireland. He was sentenced to death. That was a charge of adhering within the realm of Ireland outside the realm of England. *Perrot's Case* (1) is similar. The indictment charged that Perrot, late deputy of the Lady the Queen, in her realm of Ireland in parts beyond the sea as a false traitor against the Queen at Dublin in the said realm of the said Lady the Queen of Ireland compassed the Queen's death and to bring about the overthrow of the Commonwealth of the realms of England and Ireland, and that the Pope Gregory XIII. and the King of Spain had prepared an army to invade the realm of England, and that Perrot in the realm of Ireland wrote traitorous letters inciting the King of Spain to perform his malicious purpose. The prisoner was convicted and sentenced. He died in the Tower before execution. It is true that in each of the two cases last mentioned the adherence was within the realm of Ireland; but it was without the realm of England, and yet the trial in each case was in Middlesex. However, the matter does not rest there.

In the case of *Lords Middleton and Castlemaine, John Stafford and Others* (2) the indictment charged that, there being open war between King William III. and Lewis King of France, the defendants as false traitors without this realm of England in the kingdom of France in parts beyond the sea traitorously adhered to the King's enemies in the same war and traitorously joined and united themselves with the said adversaries and enemies and then and there treasonably comforted, aided, helped, supported, and assisted the same adversaries and enemies, contrary to their allegiance and against the peace of the King, his Crown and dignity, and contrary to the form of the statutes in such case made and provided. Most of the persons indicted were outlawed, including Stafford. He

(1) (1592) Baga de Secretis, 34 Eliz. K. B., Regina Pouch 50; 1 Cobb. St. Tr. 1316; 4 Cobb. St. Tr. 708.

(2) (1713) Unreported: Coram Rege Roll, K. B. Regina, Mich. 12 Ann., Roll 8, in the Public Record Office.

subsequently surrendered, pleaded in bar on a technical point, and produced letters of pardon.

In the *Duke of Wharton's Case* (1) the indictment charged that a war was being carried on between Philip King of Spain and His then late Majesty King George I., and that Philip Duke of Wharton, late of Westminster in the county of Middlesex, being a subject of the said Lord the late King, well knowing the premises, &c., as a false traitor against the said Lord the late King his Sovereign, true, natural, and undoubted Lord, on May 1 in the thirteenth year of the reign of the said Lord the late King and on divers other days and occasions, as well before as afterwards, in parts foreign and beyond the seas without his realm of Great Britain, to wit in the realm of Spain, by force of arms, &c., falsely, maliciously, knowingly, devilishly, and treasonably was adherent, aiding, and assistant to the same Philip King of Spain. It went on to allege that in performance and execution of his treason and adherence he without this realm, to wit in the kingdom of Spain in parts beyond the seas, joined and united himself to the army of Philip King of Spain, prosecuting the war against King George I. and attacking Gibraltar, and with his counsel and aid comforted them and adhered to them against his allegiance and against the peace of the late King, his Crown and dignity, and also against the form of the statute in such case made and provided. The Duke of Wharton did not appear, and he was outlawed.

William Cundell's Case (2) is very important. "In 1808 a number of British sailors and mariners were confined, as prisoners of war, in the Isle of France. The prison, being much crowded, was greatly incommoded with dirt and vermin, and, there being no way of escaping from such inconvenience but that of desertion, every art was practised by their keepers to induce the unhappy prisoners to enter the French service. Fifty men, among whom were Cundell and Smith, had not virtue enough to resist the temptations on the one hand, and the hope of escaping from distress and filth on the other. They forgot their country and allegiance, and put on the enemy's uniform, acting as sentinels over those who were so recently

(1) (1729) Unreported: Baga de Secretis, Trin. 2 Geo. 2, K. B. 8/67 in the Public Record Office.

(2) (1812) 4 Newgate Calendar, 62.

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their companions in captivity. These traitors continued to do duty with the French until the surrender of the island to the British forces, when Cundell and Smith, with ten others, positively refused to accompany the enemy, and threw themselves upon the mercy of their country, having immediately surrendered to the English, while thirty-eight others marched off to old France. These culprits were now transmitted to England, and a special commission was issued for their trial, which took place at the Surrey Court-house, February 6, 1812. Cundell, Smith, and five others were found guilty of adhering to His Majesty's enemies, when the Attorney-General stated that he thought the ends of justice obtained, and that he would not press the conviction of the remaining five, who were discharged, not for any want of proof of their guilt, but through the clemency of the Government. . . . . " Cundell, Smith, and the others, being sentenced to death, were then reconducted to their cells. " On Monday morning, March 16, 1812, William Cundell and John Smith, pursuant to their sentence, were hung," &c. In that case the adherence was without the realm in the Isle of France in the French colony of Mauritius. It must be added that if the view of the defence is right the defendant in *Rex* v. *Lynch* (1) ought to have been acquitted instead of being, as he was, convicted.

This weight of authority seems to justify Lord Coke in saying (2) that " The fourth "—i.e., the fourth kind of treason—" is adhering to the King's enemies within the realme or without and declaring the same by some overt act " ; to justify the King's Attorney in saying (3) " If a man be adherent to the King's enemies in France his land is forfeitable and his adherence shall be tried where his land is as has been often times done in respect of the adherents to the King's enemies in Scotland " ; Sir Matthew Hale in saying (4) " If an Englishman during war between the King of England and France be taken by the French, and there swear fealty to the King of France, if it be done voluntarily, it is an adhering to the King's enemies " ; East in saying (5) " Thus, every species of aid or comfort, in the words of the statute, which, when given to a rebel within the realm, would make the subject guilty of levying war ; if given

(1) [1903] 1 K. B. 444.
(2) 3 Inst. 4.
(3) Fitzh. Abr. Trial, fol. 219, pl. 54. See note (6), ante, p. 108.
(4) 1 Hale, P. C. 167.
(5) 1 East, P. C. 78.

to an enemy, whether within or without the realm, will make the party guilty of adhering to the King's enemies" ; and further on (1) "Englishmen living in a foreign country at the time of a rupture with us, and continuing there afterwards, are not on that account adherents to the King's enemies, unless they voluntarily swear fealty to them, or actually assist them in the war ; or, at least, unless they refuse to return home" ; and Willes J. in saying, when he delivered before the House of Lords in *Mulcahy* v. *Reg.* (2) the opinion of all the judges, that by the Treason Act, 1351, "it was declared to be treason 'when a man doth compass or imagine the death of our Lord the King,' &c., 'or if a man do levy war against our Lord the King in his realm, or be adherent to the King's enemies, in his realm or elsewhere, and thereof be probably attainted of open deed.'"

In view of these opinions of well-known writers on the law and of the judges who have been called upon to pronounce it from the earliest times down to the year 1868 and even to the year 1903, it is impossible to resist the conclusion that adherence to the King's enemies without the realm is treason and is justiciable in the Courts of this country.

Artemus Jones replied.

LORD READING C.J. A submission has been made to the Court by the defence that this indictment should be quashed on the ground that it discloses no offence known to the English law. Another way of putting the same proposition is that the Court should rule, according to the contention of the defence, that the Crown has failed to prove an offence in law. The prisoner is charged with that species of treason which is known as adhering to the King's enemies. The charge in the indictment is the offence of "high treason by adhering to the King's enemies elsewhere than in the King's realm, to wit, in the Empire of Germany, contrary to the Treason Act, 1351." The argument advanced and supported by careful, well-reasoned, and able arguments of Mr. Sullivan and those who supported his contention is to the effect that adherence to the King's enemies without the realm is not an offence against the statute of Edward III., that is to say, the statute of 1351. We have had

(1) 1 East, P. C. 80. (2) L. R. 3 H. L. 306, 318.

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the advantage of elaborate arguments, by no means too elaborate, on behalf of the defence, and also on behalf of the Crown by the Attorney-General; and although this point has been discussed many times in the books and decided, according to our view, in the most recent case of treason, *Rex* v. *Lynch* (1), yet it merits careful examination by this Court.

The argument is that this Court must construe the words of the statute of 1351 and must pay no regard to any commentary that may have been made by learned authors, however distinguished, when arriving at the meaning of the words. That we must interpret the words of the statute is beyond question. That we should not be entitled to do violence to the words of the statute may, I think, also be assumed. But if the words of the statute are not clear, and if it be possible to construe the statute in two different ways, then the comments of great lawyers, masters of the common law, during the last three or four centuries cannot be allowed by this Court to pass without the greatest regard and consideration.

The words in question in the statute 25 Edw. 3 are these, paraphrasing them: "It shall be treason if a man do levy war against our Lord the King in his realm or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere." The contention is that those words "or elsewhere" govern only the words "aid and comfort in the realm" and have no application to the words "be adherent to the King's enemies in his realm." As the offence is that of adhering to the King's enemies, if the words "or elsewhere" do not apply to the adhering, then the contention of the defence would be right. If, on the other hand, the Crown's contention is correct that those words "or elsewhere" do govern the adhering to the King's enemies, then it is plainly an offence to adhere to the King's enemies by an act committed without the realm. In order to avoid ambiguity I would add that to constitute the offence for this purpose it is not sufficient to show that the aid and comfort have been given to enemies without the realm. The act of adherence which constitutes the charge must also have been committed without the realm for this purpose, because the whole of this indictment is based upon the offence of adhering to the King's enemies without the realm.

(1) [1903] 1 K. B. 444.

Now I repeat what I said during the argument, that we must construe these words of this statute, now some 560 years old, without reference to commas or brackets, but merely looking to the language. The history of the law of treason in this country is certainly of importance in considering the statute of 1351. It is unnecessary at this time, and having regard to the authorities to which I shall call attention in a moment, to refer in great detail to the early law. But I have no hesitation myself in stating that if a man adhere to the King's enemies without the realm he is committing the offence of treason; and that he is committing the offence of treason at common law, notwithstanding that the offence is committed without the realm. We have heard considerable argument to establish that the common law of England never knew a crime which was not committed within the territory of England, that is to say, in ancient times of course; and it is said the common law of England still obtains except in so far as it has been altered by statute. There is authority for the proposition which I have stated. Sir Matthew Hale in his Pleas of the Crown (1) says: "Touching the trial of foreign treason, viz., adhering to the King's enemies, as also for compassing the King's death without the kingdom at this day, the statutes [*sic*] of 35 Hen. 8, c. 2, hath sufficiently provided for it"; then follows a passage upon which I lay special stress: "But at common law he might have been indicted in any county of England, and especially where the offender's lands lie, if he have any." In support of that reference is made to a case in the fifth year of the reign of Richard II. which is to be found in Fitzherbert's Abridgment. (2) The substance of it—I am not quoting the exact words—is that the then King's Attorney (3) stated to the Court, and apparently, so far as one can judge from the report, without any contradiction by the Court, and so far as I know without any contradiction to be found in any book up to this very day, that that was the law, and it was adopted as the law by Sir Matthew Hale in the passage which I have read. I am prepared to concede that if the statute were unambiguous in its terms we ought to construe its language without reference to the fact that it happens to be declaratory of the common law; but it is a matter not lightly to be

(1) Vol. 1, p. 169. (2) Fitzh. Abr. Trial, s. 54.

(3) See note (6) on p. 108, ante.

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passed by that the common law before this statute was, in my opinion, as I have stated it. It has been said more than once (1) that this statute of 1351 was declaratory of the common law. There is no doubt that at that time there was great agitation amongst the subjects of the King because of the fear of the consequence of being charged with treason, which was a crime at that time so vague, or thought to be so vague, that those who might be charged with it were apprehensive of the consequences; and the result was that on petition to Parliament the statute then became law and received the assent of the King in the words to which I have referred.

Now from the year 1351 until the thirty-fifth year of the reign of Henry VIII. there is little to assist us; but in the reign of Henry VIII. a statute was passed which in my view is of importance in this connection. The statute is entitled "An Acte concerninge the triall of treasons cōmytted out of the Kinge Majesties domynions." It recites—again I am paraphrasing the language—that doubts and questions had arisen as to the trial of treasons and misprisions of treasons committed abroad. It is worth noting that the doubts had not arisen as to whether the act, if committed abroad, would amount to treason, but only as to the trial. Then the statute proceeds: "Be it enacted," &c., "that all manner of offences being alredye made or declared, or hereafter to be made or declared by any the lawes and statute of this Realme, to be treasons . . . . and done ꝑpetrated or cōmytted or hereafter to be done ꝑpetrate or cōmitted by anye ꝑson or ꝑsons out of this Realme of Englande, shalbe from hensforth inquired of herd and determyned before the Kinge Justice of his Benche for plees to be holden before himselfe," that is the King's Bench, and also as an alternative by commissioners where a commission is appointed. Now that statute assumes that the offence of treason can be committed without the realm; and it prescribes in respect of all such offences as have already been declared the mode of procedure, or rather the venue of the trial. The statute shows plainly that the offence existed. From that time the statute has regulated the trial of offences without the realm. It is by virtue of that statute and subsequent statutes,

(1) 3 Inst. 1, note; *Sindercome's Case* (1657) 5 Cobb. St. Tr. 848; *Bellew's Case* (1672) 1 Vent. 254, note; *Reg.* v. *Smith O'Brien* (1849) 7 St. Tr. (N.S.) 349, per Blackburne C.J. of Ireland.

which have really done nothing more than provide that the counties of London and Middlesex shall be one county for this purpose, that the jurisdiction of this Court is derived. It is because we are sitting as judges of the King's Bench that we become the judges to try this case, for the reason that, if it is a treason committed without the realm, the venue is prescribed by this statute of Henry VIII. as of the King's justices "where the saide Benche shall sytt and be kepte." That statute of Henry VIII. at least shows clearly what the law was at the time it was passed, and is, to my mind, authority for this proposition, that there was the offence of treason without the realm; and further, quite consistently with the reading which the Crown wishes to give to the statute of 1351, it would apply to the offence of adhering to the King's enemies without the realm. The doubts that have arisen from beginning to end, so far as we have been able to trace in looking through the various books to which we have had access and to which our attention has been called, are never as to the offence, but only as to the venue. This was the whole difficulty which arose, as was pointed out by learned authors, and more especially in Hawkins's Pleas of the Crown (1), where this matter is dealt with in passages that have been read and of which I will only read one short passage now. There the learned author says "It seems to have been a great doubt before the making of the statute of 35 Hen. 8, c. 2, in what manner and in what place high treason done out of the realm was to be tried." There is not the faintest suggestion that the offence did not exist, but only a doubt as to the manner and place of trial. "For some seem to have holden that it was triable only upon an appeal before the Constable and Marshal; others, that it might be tried upon an indictment, laying the offence in any county where the King pleased; and others, that it was triable by way of indictment in that county only wherein the offender had lands; but surely it cannot reasonably be doubted, but that it was triable some way or other; for it cannot be imagined that an offence of such dangerous consequence, and expressly within the purview of 25 Edw. 3, should be wholly dispunishable, as it must have been, if it were no way triable." I am content to adopt every word of that language

(1) Hawk. P. C., bk. 2, ch. 25, s. 48, vol. 4, p. 22 (Leach); vol. 2, p. 306 (Curwood).

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of that great master of the law and also of Sir Matthew Hale, whom I have just quoted. The only observation I wish to make upon it is that the defence would say, as Mr. Sullivan pointed out, and, I think, rightly, that it does not follow that this meaning must be given to the words now under discussion because, it is said, there were other offences of treason without the realm. But equally it must be observed that the learned author suggests no exception to the general statement, and there is nothing which would support an exception being made save the interpretation of the statute contended for by the defence. I can find no justification for doubting that these learned authors meant their language to apply equally to a case of adhering to the King's enemies without the realm as to any other kind of offence of treason without the realm.

Now I will not read again the passages in Coke's Institutes, but they contain (1) a statement of the law which is plain in its terms and which Mr. Sullivan quite frankly stated was an authority against him, if the Court accepted it as an authority.

Then coming to later days there are passages in *Mulcahy* v. *Reg.* (2) in which Willes J., in giving to the House of Lords not only his opinion but the opinion of all the judges on the law relating to treason, adopted the construction of the words of the statute of 1351 that the offence is committed if a person be adherent to the King's enemies in his realm or elsewhere. He leaves out the words which have given rise to this discussion, i.e., "giving them aid and comfort." These views were adopted by the House of Lords. It is right here again to say that Mr. Sullivan pointed out, and again I say in my judgment accurately, that these observations of Willes J. were by the way; but nevertheless they were the considered opinion of the judges given to the House of Lords, and the House of Lords did not dissent from any one of the views expressed.

Then at last we come to the decision in *Rex* v. *Lynch*. (3) There the same argument was advanced by the defence that has been put forward before us, and it was persisted in and elaborately argued. The Court there came to the conclusion that the defendant's contention was wrong, and, although it gave no judgment, the then

(1) 3 Inst. 10, 11. (2) L. R. 3 H. L. 306, 318.
(3) [1903] 1 K. B. 444.

Lord Chief Justice proceeded to sum up and directed the jury as if the offence had been committed. Lynch was convicted by the jury. If the argument of the defence in the present case is right, Lynch never should have been convicted, and the Court ought to have ruled that no offence had been disclosed either by the evidence or in the indictment. The Court did not so rule, but on the contrary directed the jury upon the assumption that the offence was disclosed if the jury took a particular view of the facts.

That is a strong current of authority. I will not pass over the case in Dyer (1) to which our attention was called and upon which Mr. Sullivan placed much reliance. His argument was that on examination that case shows that there was no such offence cognizable by the common law as treason committed out of the realm; indeed he went further and argued that no such offence was known to the law at all, because no means had been found of trying the offence until the statute 35 Hen. 8, c. 2. But a consideration of the case in Dyer (1) shows that it is not a judgment at all; it is a memorandum of the judges and the King's serjeants, some doubt having arisen as to whether a statute of 1 & 2 Ph. & Mar. had repealed the statute of 35 Hen. 8, c. 2, in so far as that statute declared that treasons without the realm should be tried by the judges of the King's Bench. In the result they came to the conclusion that the statute of Henry VIII. was not repealed. Reliance was placed before us upon the words "because no offence of treason committed out of the realm was triable here by the course of common law." The obvious comment is that the words assumed that there was an offence of treason committed out of the realm. The difficulty was that it was not known how it was triable by the course of the common law. All that was done by the judges and the Master of the Rolls there assembled was to declare the effect of this statute 1 & 2 Ph. & Mar. The question which has been argued before us was not raised. On the contrary it was assumed that there was such an offence as treason without the realm. The difficulty, which one finds running through centuries of our law, is as to the procedure when there was treason without the realm—that is, as to the venue of the trial.

Our attention was called by the learned Attorney-General to

(1) Dyer, 131b.

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a series of cases of which I only propose to refer to three and to rely only upon one. First there was the case of *Lord Wentworth, Grymston, and Chamberleyn.* (1) The indictment there, we are told by the Attorney-General, was for an offence committed in Calais. Lord Wentworth apparently was sent to the House of Lords to be tried; Grymston was acquitted; Chamberleyn was convicted. I find it difficult to take that case as an authority. Indeed I do not think we can regard it as one because it was tried in the year 1558, and according to the indictment it seems clear that the offence was laid treating Calais as within the King's dominions. Consequently in my judgment that case does not help us. The next case he cited was the *Duke of Wharton's Case* (2), which was tried in the year 1729. There, according to the statement made from investigation of the indictment and the record, the offence was of adhering to the King's enemies in Spain. The overt acts show the offence of adhering committed in Spain and the aid and comfort given in Spain; so that the complete offence of treason without the realm was there charged. The Duke of Wharton did not appear and was outlawed. That case assumes that by the law of England he had committed the offence. It is to be observed that the defendant did not appear and did not put his case before the Court, and therefore the case has not the full authority which would be given to a case in which the defence raised the point under discussion. The third case was that of *William Cundell*, tried in the year 1812, of which the record is extant, but of which there is no report except in the Newgate Calendar. (3) It was a case of adhering without the realm to the King's enemies and giving them aid and comfort there. The case was tried. The persons were within the jurisdiction of this Court and sentence was pronounced. Therefore in the year 1812 there is distinct authority for saying that it is an offence to adhere without the realm to the King's enemies. It was the case of persons who were confined in the Isle of France and who had there forsaken their allegiance to the King and transferred it to the French. In

(1) Unreported: Baga de Secretis, K. B. 1 Eliz., Pouch 38, in the Public Record Office.

(2) Unreported: Baga de Secretis, Trin. 2 Geo. 2, K. B. 8/67, in the Public Record Office.

(3) Vol. 4, p. 62.

view of that judgment it cannot be said that there is no authority to be found in our books for the proposition advanced by the Crown until the authority of *Rex* v. *Lynch*. (1)

I do not propose to go further through the various authorities. I have called attention to the most important of them. I come to the conclusion that the offence, if proved in fact, has been committed in law. We are merely considering now the case upon the assumption that the facts prove it. The argument of the defence is put forward on the basis that no offence is made out in law. The result of the argument upon this motion is that in my judgment the words "giving to them aid and comfort" may be read as a parenthesis; yet I do not confine the application of the words "or elsewhere" to that parenthesis; I think they apply just as much to the parenthesis as to the words which precede it. My view is, although it is not necessary to state it for the purposes of this case, that the words "or elsewhere" govern both limbs of the sentence—both the adhering to the King's enemies and the aid and comfort to the King's enemies—and that it is an offence to adhere within the realm or without the realm to the King's enemies, and it is equally an offence to adhere within the realm to the King's enemies by giving them aid and comfort without the realm.

For these reasons I am of opinion, notwithstanding the learned and able arguments that have been addressed to us, that the point fails and that the motion to quash the indictment must be refused.

AVORY J. I agree that this objection fails whether it be regarded as an objection to the indictment that it discloses no offence upon the face of it, or whether it be regarded as an objection that there is no evidence to go to the jury of an offence committed within the meaning of the statute of Edward III.

It would, in my opinion, be sufficient in this Court to say that the point which has been argued before us so strenuously and with so much learning has been already decided by this Court in *Rex* v. *Lynch* (1), but, having regard to the criticisms which have been passed upon that case, I think it right to add my own reasons for coming to the same conclusion as that which has been expressed by my Lord Chief Justice.

(1) [1903] 1 K. B. 444.

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First of all, it is not right to say that the point was not in fact decided in *Rex* v. *Lynch*. (1) While it is true that no formal judgment was pronounced on the objection, it will be found by reference to the report of the case in *The Times* Law Reports (2) that the Lord Chief Justice stopped the Attorney-General in his reply to the argument and said that the Court was satisfied upon the point and that unless he desired to cite any further authorities they did not wish to hear him further. That was in fact a decision that the point taken was a bad one. But further, and beyond the fact, to which allusion has been made, that the prisoner in that case could not have been convicted unless the point was decided against him, it will also be found in the same report (3) that towards the close of his summing-up the learned Lord Chief Justice said "that the charge against the prisoner was that of aiding the King's enemies; and he had already told them that the facts which had been laid before them amounted to aiding the King's enemies, and that, wherever it was done, this was an offence in respect of which, if proved, the prisoner ought to be found guilty under the indictment." So that there was an express direction in terms in that case to the jury that wherever the acts were done of adherence to the King's enemies, that was an offence within the meaning of the statute.

It is also clear that the Court must interpret this statute of Edward III. in the light of the fact that it has been decided to be an Act declaratory of the common law. I cannot doubt that before the statute it was treason in a British subject to join the forces of an enemy abroad, and that if a British subject had joined the forces of an enemy abroad at war with this country, and he afterwards returned or was brought back to this country, he could be tried here for that offence. When one has regard to the nature of this offence of high treason I think it is obvious it must have been so. Foster in his Crown Law thus describes the offence of high treason (4): "High treason being an offence committed against the duty of allegiance, it may be proper . . . . to consider from whom, and to whom allegiance is due. With regard to natural born subjects there can be no doubt. They owe allegiance to the Crown at all times and in all places.

(1) [1903] 1 K. B. 444.
(2) 19 Times L. R. 163, 173.
(3) Ibid. 178, 179.
(4) Fost. C. L. 183.

This is what we call natural allegiance, in contradistinction to that which is local. . . . . Natural allegiance is founded in the relation every man standeth in to the Crown, considered as the head of that society whereof he is born a member ; and on the peculiar privileges he deriveth from that relation, which are, with great propriety, called his birthright ; this birthright nothing but his own demerit can deprive him of ; it is indefeasible and perpetual ; and consequently the duty of allegiance, which ariseth out of it, and is inseparably connected with it, is in consideration of law likewise unalienable and perpetual." In view of that definition of the offence of high treason I think it cannot be doubted, as I have said, that such an offence committed by a British subject abroad was triable, justiciable, in this country ; and the only doubts which had arisen before the statute of Henry VIII. were, as expressed by Hawkins in his Pleas of the Crown, in the passage which my Lord has already read—not a doubt whether it was triable here, not a doubt whether it was an offence committed by a British subject, but a doubt only as to the proper place and the proper manner in which it should be tried. He points out that some have held that it should be tried in one county ; others that it should be tried in another county ; others that it should be tried upon an indictment laying the offence in any county where the King pleased. That, no doubt, had reference to a special commission issued by the King for the trial of a particular treason, which commission would, in my opinion, get rid of all difficulty about local venue.

That being so, if this was an offence triable in this country before the statute of Edward III. —that is to say, if the offence of treason committed abroad was triable in this country before the statute of Edward III. and that statute is declaratory only of the common law—it would be a strange conclusion that the statute has limited the offence to treasons or to overt acts committed within the realm. As the Attorney-General has pointed out, the offence of adhering to the King's enemies, giving aid and comfort to them, is an offence which is more likely, prima facie at all events, to be committed out of the realm than within it, and it would be a strange enactment to provide, if the common law was as I have said, that after this date the offence could only be committed by a person who was within the realm at the time when he committed it.

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With reference to the construction of the actual words, again it would be sufficient, as my Lord has pointed out, to say that the great authorities have uniformly put upon these words the construction which the Crown invite us to give them, namely, that the statute does not limit this kind of treason to treason committed by a subject within the realm. But there appear to be two constructions of it which have been adopted, either of which will satisfy and answer this objection. It may be that the words "or elsewhere" are to be read as applying to the words "be adherent to the King's enemies"—that is to say, if he be adherent to the King's enemies in his realm or elsewhere; or it may be, as Serjeant Hawkins seemed to think when he said (1), "As to the second point, viz., what shall be said to be an adherence to the King's enemies, &c., this is explained by the words subsequent, 'giving aid and comfort to them,'" that the proper construction of this section is that the words "giving aid and comfort to them in the realm or elsewhere" are an explanation or an exposition of the kind of adherence to the King's enemies which is aimed at by the statute. Nobody questions that the words "or elsewhere" apply to the giving of aid and comfort to the enemy, and it may be, therefore, that the proper construction is that if a person gives aid and comfort to the King's enemies either in the realm or elsewhere he is committing the offence of adhering to the King's enemies within the meaning of this statute. Whichever view be taken, it is sufficient to say that all the authorities agree that it is not limited in the manner in which the learned counsel for the prisoner have invited us to confine it.

It only remains to consider in one word the statute of Henry VIII. which provides for the trial in this country of treasons committed abroad. In my view there is nothing in that statute which assists the argument for the prisoner. The recital of it is "Forasmuche as some doubtes and questions have bene moved that ẽten kindes of treasons, mysprisions and concealmentꝭ of treasons, done ꝑpetrated or cõmytted out of the Kingꝭ Majesties realme of Englande and other his Graces Dnions cannot ne maye by the cõmon lawes of this realme be enquired of . . . ." In my opinion that recital or

(1) Hawk. P. C., bk. 1, ch. 17, s. 28, vol. 1, p. 91 (Leach); ch. 2, s. 28, vol. 1, p. 12 (Curwood).

preamble of the statute rather assumes that there are already certain kinds of treason committed out of the realm which may be tried within the realm, and the probability is that the statute was only for removing doubts as to the other kinds of treason many of which had been enacted either in the reign of Henry VIII. or shortly before. At all events it makes it clear that after that date any treason committed out of the realm may be tried, as this one is being tried, by His Majesty's judges in the King's Bench.

For these reasons I agree that this objection must be overruled.

HORRIDGE J. After the very careful consideration by the Lord Chief Justice of the law before the statute of Edward III., of that statute itself, of the cases in which the decision involved the construction of the statute, and of the writings of learned authors, I do not think I should usefully occupy the time of the Court by again reviewing those matters. All I wish to say is this: My view is that the true construction of the statute is to be found in the opinion of the judges in the case of *Mulcahy* v. *Reg.* (1) in the words of Willes J., "if a man . . . . be adherent to the King's enemies, in his realm or elsewhere," and that there ought only to be added to that the direction as to the use of the words "or elsewhere" contained in the judgment of the Lord Chief Justice. I agree with every word of that judgment, and I also agree that this objection fails.

Counsel for the prisoner and for the Crown respectively having addressed the jury upon the evidence, the Lord Chief Justice summed up the case. As to the meaning of the words "giving to them aid or comfort" he directed the jury as follows:—"If a British subject does an act which strengthens or tends to strengthen the enemies of the King in the conduct of a war against the King, that is in law the giving of aid and comfort to the King's enemies. Again, if a British subject commits an act which weakens or tends to weaken the power of the King and of the country to resist or to attack the enemies of the King and the country, that is in law the giving of aid and comfort to the King's enemies."

(1) L. R. 3 H. L. 306, 318.

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The prisoner was found guilty. The Lord Chief Justice pronounced sentence of death.

The prisoner appealed.

July 17. *A. M. Sullivan* (*Artemus Jones* and *J. H. Morgan* with him), for the appellant, again argued as above.

Sir Frederick Smith, A.-G., Sir George Cave, S.-G., Bodkin, Travers Humphreys, and *Branson*, for the Crown, were not called upon.

The opinion of the COURT (Darling, Bray, Lawrence, Scrutton, and Atkin JJ.) was delivered by

DARLING J. In this case the appellant was indicted for high treason in adhering to the King's enemies elsewhere than in the King's realm, that is to say, within the Empire of Germany, and his act was said to be contrary to the Treason Act, 1351, the statute of 25 Edw. 3, stat. 5, c. 2. That statute says: "Whereas divers opinions have been before this time in what case treason shall be said, and in what not; the King, at the request of the Lords and of the Commons, hath made a declaration in the manner as hereafter followeth,"—which is the statute of Edward III., and various treasons are defined; and after the treason of levying war against the King in his kingdom there is defined (because it is only, as has often been said, declaring the common law) this particular treason. I will read it first in the words in which it is written in the Parliament Roll and in the Statute Roll, now in the Record Office, in Norman French, and then I will read it in the translation which has been published long ago under the authority of the King's printers. The words are these: may commit treason by levying war against the King, and so on, "Ou soit aherdant as enemys nr̃e Seignr le Roi en le Roialme donant a eux eid ou confort en son Roialme ou par aillours," and that has been translated "or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere." The construction of those few words has given rise to all the argument which has been addressed to the Court before whom the appellant was tried and to this Court.

Now we desire to say—every member of this Court desires to say—that we are greatly indebted to Serjeant Sullivan, who has appeared

for the appellant in this case. We desire to say that in our judgment his argument was in every way worthy of the greatest traditions of the King's Courts, in one of which it was delivered. Having said that, it is from no want of respect to his argument that we did not call upon the Attorney-General, but the Court, having considered fully and attentively every argument used by Serjeant Sullivan and the authorities he advanced for it, have come to the conclusion that there was no need to call for any refutation of it from the Attorney-General. The authorities have been fully cited; there is no consideration which is not before the Court, because the answer, so far as it was an answer, to Serjeant Sullivan's argument had been made by the Crown at the trial, and Serjeant Sullivan himself was thoroughly aware of what might be the answer to any proposition which he put before us. We have considered, therefore, with the advantage of having known to us all that passed at the trial, the argument which he has so well—so excellently, I may say—addressed to us.

Now the main point raised in the argument of Serjeant Sullivan was that this statute had neither created nor declared that it was an offence to be adherent to the King's enemies beyond the realm of the King, and that the words meant that the giving of aid and comfort *par aillours*—that is outside the realm—did not constitute a treason which could be tried in this country unless the person who gave the aid and comfort outside the realm—in this case within the Empire of Germany—was himself within the realm at the time he gave the aid and comfort. This argument was founded upon the difficulties which must arise owing to the doctrine of venue, that people were only triable within certain districts where the venue could be laid; that if a man committed a crime in a county he must be indicted and tried for it in that county; that if he committed a crime against the King he must be tried within the realm; and that if the aid and comfort were given outside the realm by a person then being outside the realm he could not be tried there—that follows, because it was not within the King's realm; and that as he could not be tried by the King's Courts in the Empire of Germany he could not be tried here; he could not be tried in the King's Courts at all for what he had done in Germany, unless when he gave the aid and comfort in Germany he was himself actually resident

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within the realm of the King. It was said this must be so or one could find a case where a man had altogether outside the realm given aid and comfort to the King's enemies and had been indicted within the realm and tried for it. Such a case would be difficult to find in the course of years, because it cannot be a very common offence. First of all, if a man did those things pure and simple it is highly improbable that he would then put himself in peril by coming within the realm, where what he had done might be investigated and where he might be punished for it. One would expect that very few people would put themselves in a position where they could possibly be charged; but if any of them did, it is so highly probable that, besides the giving of aid and comfort outside the realm, they would have done something inside the realm; and that if they came back they would have done so with some evil intention, such as levying war, compassing the King's death, or doing something of that sort, that they would very probably be arrested on their arrival in this country and not charged with being adherent to the King's enemies outside the realm, but charged with some such offence as anybody being within the King's realm could commit there; it would be much more easily proved; and, if the two offences had been committed, as would be extremely probable, in the one case, any one having the direction of a criminal prosecution would be certain to charge him for the offence which could be the more easily proved. Therefore we are not very much impressed by the fact that there is very little precedent for such a prosecution as this.

But there is a large amount of authority for the proposition that what the jury have found was done by this appellant, and what it is not contested was done, because there is here no appeal upon the facts, is an offence triable, as this offence was tried, in the King's Bench. Taking the words of the statute themselves, it appears to us that the construction for which Serjeant Sullivan contends is not the true one. He would have it that "be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere," means that the adherence, because it is the adherence which is the offence, must be by a person who, being in this country, gives the aid and comfort, it may be in this country, it may be outside of it. We agree that if a person being within

this country gives aid and comfort to the King's enemies in this country he is adherent to the King's enemies ; we agree (and Serjeant Sullivan admits this) that if he is in this country and he gives aid and comfort to the King's enemies outside this country he is adherent to the King's enemies. But we think there is another offence, and that these words must mean something more than that. We think that the meaning of these words is this : " giving aid and comfort to the King's enemies " are words in apposition ; they are words to explain what is meant by being adherent to, and we think that if a man be adherent to the King's enemies in his realm by giving to them aid or comfort in his realm, or if he be adherent to the King's enemies elsewhere, that is by giving them aid or comfort elsewhere, he is equally adherent to the King's enemies, and if he is adherent to the King's enemies, then he commits the treason which the statute of Edward III. defines. Reasons may be given for that, but we think a very good reason is to be found in this, that the subjects of the King owe him allegiance, and the allegiance follows the person of the subject. He is the King's liege wherever he may be, and he may violate his allegiance in a foreign country just as well as he may violate it in this country. If authority were wanted for that it is to be found in *Rex* v. *Cundell.* (1) I put out of the question Serjeant Sullivan's argument as to where the person could be tried, whether he could be tried by commissioners, or by commission of oyer and terminer, or in the King's Bench ; but a really shocking example of what allegiance may mean is to be found in *Cundell's Case* (1), where prisoners of war, being then in the Isle of France, which we now call by its older name Mauritius, were seduced from their allegiance ; they had adhered to the King's enemies ; being recaptured, they were actually tried here in England, and one of them, Cundell, was executed for high treason ; the others were pardoned. That was because he had violated his allegiance which followed him, which remained with him wherever he might be outside the King's dominions, and by which he was bound even when he was a prisoner of war. Of course I do not cite that case to commend it for its humanity, but merely to say that as a matter of strict law it is perfectly good law, and the only reason why it is not decisive of this case is that it does not dispose of the question as

(1) 4 Newgate Calendar, 62.

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to where the person who has committed the particular treason can be tried or how he can be tried.

Now I have said that it is the opinion of the Court that there is a great deal of authority for this proposition, that adherence to the King's enemies outside the King's dominions by a person who is himself outside them constitutes the commission of this treason by the person who is elsewhere than within the King's realm. It is worth while to notice that this question must have been discussed ; people may have doubted how a person could be tried, but it must have been discussed among lawyers as to how he could be tried. There is a long and ancient opinion, as I will show when I read the cases presently, for the proposition that it is treason to do what the appellant has been convicted of doing in this case.

A statute was passed which has been often cited here, a statute of 35 Hen. 8, and what it says is this : "An Acte concerninge the triall of treasons cõmytted out of the Kinge Majesties domynions." There is a distinct statement that you can commit treason out of the King's dominions ; it is only a question of how the person is to be tried ; and it says : [The learned judge read the section of the statute set out above to the words "to be holden before himselfe," and proceeded.] Therefore this trial was rightly had in the King's Bench provided what was done by the appellant amounted to treason by virtue of the statute of Edward III. If it was such a treason it was rightly tried. Whether it was or not depends upon the construction which we ourselves, reading this statute, put upon it. Serjeant Sullivan has asked us simply to take the statute and read it as though we had seen it for the first time, and he says that is the best way to construe any statute. Well, it is a little difficult for anybody who is a judge of the King's Bench to say that he reads for the first time the statute of Edward III. concerning treasons. We must all have read it before. But I do not know that the rule which Serjeant Sullivan lays down is altogether an acceptable one. In Maxwell on the Interpretation of Statutes (1) there is this passage : "It is said that the best exposition of a statute or any other document is that which it has received from contemporary authority. Optima est legum interpres consuetudo"—and then another maxim is stated. "Where this has

(1) 5th ed. (1912), ch. xi., p. 489.

been given by enactment or judicial decision, it is of course to be accepted as conclusive. But further, the meaning publicly given by contemporary, or long professional, usage, is presumed to be the true one, even when the language has etymologically or popularly a different meaning. It is obvious that the language of a statute must be understood in the sense in which it was understood when it was passed ; and those who lived at or near the time when it was passed, may reasonably be supposed to be better acquainted than their descendants with the circumstances to which it had relation, as well as with the sense then attached to legislative expressions ; moreover, the long acquiescence of the Legislature in the interpretation put upon its enactment by notorious practice, may, perhaps, be regarded as some sanction and approval of it."

Now this statute has been understood long before to-day, has been understood by lawyers of great learning and lawyers of very exceptional erudition who have been members of the King's Bench, and understood in the sense in which we have to-day said we understand it. Serjeant Sullivan has attacked their authority ; he has, quite properly, assailed the authority of Lord Coke ; he has questioned the reasons, if there be any, for the statements which Lord Coke has made concerning the law ; and if we were to accede to the argument of Serjeant Sullivan we should have absolutely to disregard the opinion of Lord Coke, the opinion of Mr. Serjeant Hawkins, and the opinion of Sir Matthew Hale, all great names in the law, and persons whose opinions have long been followed in many questions of extreme difficulty which have puzzled lawyers for many generations. Let us see what Hale says. Sir Matthew Hale in his Pleas of the Crown says this (1) : " Touching the trial of foreign treason, viz. adhering to the King's enemies, as also for compassing the King's death without the kingdom at this day, the statute of 35 Hen. 8, c. 2, hath sufficiently provided for it " ; he cites *Story's Case* (2) and continues : " but at common law he might have been indicted in any county of England, and especially where the offender's lands lie, if he have any." That is a very definite statement, and if we were to allow this appeal we should be bound to say that it did not state the law. Are we entitled to throw over the opinion of Sir Matthew Hale as cavalierly as we

(1) 1 Hale, P. C., ch. 15, p. 169. (2) Dyer, 298, 300.

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are invited to do ? Looking at this book, The History of the Pleas of the Crown, how comes it to be in our hands ? I read at the very beginning of it: "Extract from the Journal of the House of Commons Lunae 29° die Novemb. 1680. Ordered, that the executors of Sir Matthew Hale, late Lord Chief Justice of the Court of King's Bench, be desired to print the MSS. relating to the Crown law; and that a committee be appointed to take care in printing thereof, and it is referred to Sir William Jones, Serj. Maynard,"— a name to be reverenced in legal history—"Sir Fra. Winnington, Mr. Sacheverel, Mr. Geo. Pelham and Mr. Paul Foley"; and it is because of their care and by order of Parliament that we have this book in our hands at all.

Then there is Mr. Serjeant Hawkins, who says (1) this: "It seems to have been a great doubt before the making of the statute of 35 Hen. 8, c. 2, in what manner and in what place high treason done out of the realm was to be tried. For some seem to have holden, that it was triable only upon an appeal before the Constable and Marshal; others, that it might be tried upon an indictment, laying the offence in any county where the King pleased; and others, that it was triable by way of indictment in that county only wherein the offender had lands: but surely it cannot reasonably be doubted, but that it was triable some way or other; for it cannot be imagined that an offence of such dangerous consequence, and expressly within the purview of 25 Edw. 3, should be wholly dispunishable, as it must have been, if it were no way triable." Serjeant Sullivan's argument is that it was dispunishable because you could not try it, if the kind of treason alleged were what is alleged in this case.

I mentioned yesterday—and I think it is worth mentioning again, because we are confessedly relying upon the authority of Sir Matthew Hale and of Serjeant Hawkins in the judgment that we are giving, and also upon the opinion expressed by Lord Coke to which I will come presently—that there is a passage in the case of *Butt* v. *Conant*. (2) Dallas C.J., himself no mean authority, says this: "We are told that we must look to the authorities, and find what we can in the books upon the subject. Now if the authority of Lord

(1) Hawk. P. C., bk. 2, ch. 25, s. 48; vol. 2, p. 306 (Curwood); vol. 4, p. 22 (Leach);

(2) (1820) 1 Brod. & B. 548, 570.

Hale, and that of Mr. Serjeant Hawkins, are to be treated lightly, we may be without any authority whatever." (Here we are asked to treat them more than lightly, we are asked to reject them altogether.) "With respect to Lord Hale, it is needless to remind those whom I am now addressing"—this was in 1820—"of the general character for learning and legal knowledge of that person, of whom it was said, that what was not known by him, was not known by any other person who preceded or followed him; and, that what he knew, he knew better than any other person who preceded or followed him. With respect to Mr. Serjeant Hawkins, we know his authority. These are books which are in the hand and head of every lawyer, and constantly referred to on every occasion of this sort. I must, therefore, look to these books; and I shall proceed to examine the exposition given by text writers of the words of those statutes, and the commission of the peace."

Now with regard to Lord Coke, his opinion is precisely the same as that which is given by Sir Matthew Hale and Mr. Serjeant Hawkins, and it has been said to us that we should not follow Lord Coke because Stephen in his Commentaries and other writers elsewhere have spoken lightly of the authority and learning of Lord Coke. (1) It may be they have done so. Of course they have all the advantage. They are his successors. If Lord Coke were in a position to answer them, it may be they would regret that they had entered into argument with him; but, although Stephen and others have perhaps flouted the opinion of Lord Coke, he has been recognized as a great authority in these Courts for centuries, and nowhere more than perhaps in the passage I am now about to read, which I owe to my brother Atkin, in the case of *Garland* v. *Jekyll* (2): "I know it has been said, that Lord Coke in this case must be mistaken, for in the margin is a reference to Lord Coke's Reports, and upon referring to the page you find nothing to warrant his opinion. I have looked into the report, and the observation is correct, but it will be found that the same observation will apply to cases that are relied on on the other side; it appears to me that

(1) [Coke's authority as a witness to what the law was understood to be in his own time is to be carefully distinguished from his opinions in historical and antiquarian matters.—F. P.]

(2) (1824) 2 Bing. 296.

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the reference was not made by Lord Coke, but that it has been introduced by some ignorant editor who fancied something confirmatory of the opinion in 4 Coke. The fact is, Lord Coke had no authority for what he states, but I am afraid we should get rid of a good deal of what is considered law in Westminster Hall, if what Lord Coke says without authority is not law. He was one of the most eminent lawyers that ever presided as a judge in any Court of justice, and what is said by such a person is good evidence of what the law is, particularly when it is in conformity with justice and common sense." Those are the words of Best C.J.

If one wanted an opinion of a person who was not a lawyer, it is where this same Lord Coke is alluded to by John Milton as one who—

> " On the royal Bench
> Of British Themis, with no mean applause,
> Pronounced, and in his volumes taught our laws,
> Which others at their Bar too often wrench." (1)

There are other authorities who understood this matter in precisely the same way, not authorities as great as Lord Coke, but it is worth while, I think, to show what was the volume of opinion during ages when lawyers were considering this particular matter. There is a treatise perhaps not very commonly known—I referred to it yesterday—by Mr. Ferdinando Pulton, a barrister of Lincoln's Inn, and the particular copy I am reading from was published in 1609. He says that his views are " collected out of the reports of the common lawes of this realme, and of the statutes in force, and out of the painfull workes of the reverend judges," mentioning them ; and there is this passage (2) : " And because by the said statute of 25 Edw. 3 it is declared to be high treason to levie warre against the King in his realme, or to be adherent to his enemies, aiding them in his realme or elsewhere ; therefore if a subject borne of this realme being beyond the seas, doth practice with a prince or governor of another countrey to invade this realme with great power, and doe declare, where, how, and by what meanes the invasion may best be made, it is high treason ; for an invasion with great power cannot be, but of likelihood it will tend to the destruction or great perill of the K. and hurt to the realme ; and moreover the said offendor

(1) Sonnet to Cyriack Skinner. (2) De Pace Regis, fol. 110a, pl. 4.

hath manifested himselfe to be adherent to the K. enemy and to aid him with his counsel, though not in the realme, yet elsewhere. And this offence shall be tried in the K. Bench, or elsewhere, before such commissioners, and in such countie, as the King by commission shal appoint, according to the stat. of 35 Hen. 8. 2."

A much more modern writer was of the same opinion, Sir James Fitzjames Stephen. In his Digest of the Criminal Law he says (1): "Every one commits high treason who, either in the realm or without it, actively assists a public enemy at war with the Queen."

A valuable opinion to the same effect was given in the year 1775, and it is referred to and can be found in Archbold's Criminal Pleading, where this is said (2): "In 1775 the law officers (Thurlow A.-G. and Wedderburn S.-G.) had been informed—(1.) that in 13 Ann. an Act against high treason had been passed in the province of New Hampshire;"—which was in the King's dominions in America—"(2.) that the said Act was disallowed by Order in Council in 1718; (3.) that it was conceived that there was no law of that province at present existing for the trial and punishment of that offence. They were asked in what manner it was proper to proceed against persons for high treason committed in New Hampshire. They replied: 'We are humbly of opinion that it requires no Act of a provincial Legislature to constitute the offence of high treason in any of His Majesty's plantations. The crime may be prosecuted in the Superior Court of New Hampshire (which by 11 Wm. 3 hath the full criminal jurisdiction within that government which His Majesty's Court of King's Bench exercises here), or in this country under the statutes of 35 Hen. 8 as the occasion may require.'" That was exactly this case. The treason was not committed within the King's realm; it was committed elsewhere. There is no pretence that the person who committed it by being adherent, or whatever form the treason took, was within the King's realm. That is a distinct statement which covers this case exactly, and that is the opinion of two such law officers as Lord Thurlow and Lord Loughborough, absolutely consonant with the opinion which this Court is expressing to-day.

I do not know that it is worth while to allude to the paragraph

(1) 5th ed. (1894), art. 55, p. 44. (2) 24th ed. (1910), p. 1033, note (*a*).

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to which Serjeant Sullivan called our attention in *Platt's Case* (1), but it is to be noticed that no stress whatever is laid by the Court there upon the words which Serjeant Sullivan insists govern the whole of this particular definition of treason, that is the words "in his realm," because what is said is: "It was the ancient opinion, that the species of treason, which consists, by 25 Edw. 3, c. 2, in adhering to the King's enemies, might be tried, before the statute 35 Hen. 8, c. 2, within the kingdom, by the rules of the common law, though the aid and comfort was afforded without the realm."

We do not think it necessary to give further reasons for the conclusion to which we have come. We purposely do not rely upon a recent case which has been questioned by Serjeant Sullivan, simply for the reason that we are of opinion that the conclusion to which the Court indubitably came in that case is supported by ample authority to be found in the decisions and in the opinions of great lawyers to which I have referred in giving the judgment of this Court.

It only remains to say that the appeal is dismissed.

Appeal dismissed.

Solicitor for appellant: *G. Gavan Duffy.*

Solicitor for the Crown: *The Director of Public Prosecutions.*

NOTE on the authorities cited in 3 Inst., p. 10, in support of Lord Coke's explanation of the word "adherent":—

Rot. Parl. 20 *Edw.* 1, *nu.* 2 (1292), *John de Brittaine's Case.*—This was a petition in Parliament for the restoration of a certain manor which had escheated to the Crown because a former owner "adhaesit parti Regis Francie contra fidem et partem praedicti Henrici Regis Anglie." The petition was not granted.

Rot. Parl. 33 *Edw.* 1, *Rot.* 6 (1305), *Robert de Ros de Werke's Case*, Placita coram Rege, Octab. Nativ. B. Mar., membr. 1.—This was a petition by the heiresses of Robert de Ros and by John Salveyn, the husband of one of them, for restoration of lands formerly held by their ancestor in England and Scotland which had been forfeited because he had adhered to the Scots. The petition was refused because it was recorded that "dictus Robertus de Ros . . . . contra homagium, fidelitatem, et ligientiam suam, de ipso Domino Rege tradiciose et felonice se elongavit, et inimicus ipsius Domini Regis manifeste devenit, parti

(1) 1 Leach, 168.

Scottorum adherendo . . . . nec unquam postea in vita sua ad pacem ipsius Domini Regis rediit, set inimicus suus obiit."

Year Book, Pasch. 8 *Edw.* 3, *fol.* 20, *pl.* 6 (1334).—In this case one Alice claimed dower of the lands of William her husband. The defendant pleaded that William went to Scotland and adhered to the enemies of the King and there remained and died an enemy in their allegiance. After some discussion upon this plea Herle C.J. asked, "How do you propose to prove the felony?" Elmer, counsel for the defendant, answered, "Sir, by the country." Herle C.J.: "Felony ought to be proved by record. Suppose he did remain with the King's enemies, it does not follow that he is a felon; he might have remained against his will." The defendant's counsel then said he was ready to prove that William went to Scotland and there joined the King's enemies in a raid upon Northumberland, "a matter which may well lie in the cognizance of the country."

Year Book, Mich. 38 *Edw.* 3, *fol.* 31*a.* (1364).—This was a quare impedit in which the King claimed a manor and advowson of which one R. was seised until he adhered to the King's enemies and was outlawed. In this case it does not appear whether the adherence was within or without the realm.

Rot. Parl. 4 *Ric.* 2, *nu.* 17 *et seq.* (1380).—Sir Rauf de Ferriers was arrested in the Scottish Marches and brought before Parliament to answer on suspicion of adhering to the French enemies of the King and especially concerning certain letters found in the fields near London, some under the seal of Sir Rauf directed to enemies in the kingdom of France and others to Sir Rauf from those persons. The letters were found to be forgeries and Sir Rauf was allowed to go at large.

5 *Ric.* 2, *Trial* 54 (1382).—This seems to be a reference to Fitzherbert's Abridgment, Trial 54.—"Quare impedit by the King against one P., clerk of a church in the bishopric of Durham. The count stated that the bishop, who was dead, presented one as his clerk; that the clerk died and the chapel was collated upon a cardinal, naming his name; that because of miscreancy and schism the church became void; the taking of the temporalities into the hand of the King, and the right of the King to present.

Burgh: "He has alleged that the church is void for miscreancy of a cardinal at the Church of Rome, which is not triable here, wherefore (we pray) judgment whether the Court will take cognizance of it."

Bealknap C.J.: "I say for certain that the Court has cognizance of this plea, and that I prove by reason that the whole Court Christian is one Court, and if a man in the Arches here in this country is arraigned of a crime for which he is liable to deprivation and then appeals to the Court at Rome and is deprived, that deprivation is triable in the Court of the King just as if he had been deprived in the Arches, since it is all one Court; and if a man be adherent to the enemies of the King in France his land may be forfeited, his adherence shall be tried where his land is, as has been often done of adherents to the enemies of the King in Scotland. And, Sir, by my faith if a man be miscreant his land is

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forfeitable and the lord shall have it by way of escheat, and reason demands this, for if a man who forsakes the allegiance of his liege Lord the King forfeits his land a multo fortiori where he forsakes the allegiance of God." And that Bealknap swore to be law; wherefore Burgh made answer.

Burgh: "Sir, the church became void in the time of the bishop who is dead, and we were the parson impersonee in the time of the same bishop of the provision of the Pope &c., without this that the church became void by the miscreancy of the cardinal &c., the temporalities being in the hands of the King [and this we are] ready to prove &c."

And the others plead to the contrary for the King. And a venire facias was awarded to the sheriff of the county where the church was, and not to the Bishop of Durham, nor to his seneschal nor bailiff; and it was said that the miscreancy should be tried where the church was and the same of the deprivation decreed by the Court of Rome, and this appears by this plea here by the judgment &c.: *quod nota.*

Hil. 18 *Edw.* 3, *Coram Rege, Rot.* 145 *: Eboracsira.*—This appears to be a false reference. A careful search has failed to discover the case which the annotator had in mind.

Ass. 43 *Edw.* 3, *pl.* 28, 29 (1369).—In this case it was found by an inquest of office in the Chancery that one W. de Herlington, who was seised of certain lands in the county of York, was aiding Gilbert de M., who was an enemy of the King, wherefore the lands were seized into the hands of the King. The rest of this case seems immaterial. In the end restitution was granted to W. Lord Coke states that Gilbert de M. was a Scot.

Further proceedings appear in placitum 29 (the reference to 42 Ass. seems to be a mistake), where it is stated that by another office it was found that H. de Herlington, the father of W., was aiding, &c., wherefore the lands were seized back and then granted by patent to another. W. presented a petition in Parliament and restitution was granted to him. The rest of this case seems immaterial.

Rot. Parl. 7 *Ric.* 2, *nu.* 15 *et seq.* (1383).—The Bishop of Norwich, commander of the King's forces in Flanders, was called to account for surrendering the town of Graveling to the enemy and accepting bribes from them. Sects. 18—23 set out the proceedings. In the end the bishop was put to a fine and ransom for his misdoing and the temporalities of his bishopric were seized to compel payment. See also 4 Cobb. St. Tr. 282, 307.

Rot. Parl. 7 *Ric.* 2, *nu.* 17 (1383).—Peter de Cressyngham and John de Spykesworth were arrested and arraigned in Parliament for taking a bribe and surrendering the castle of Drinkham in Flanders to the enemy. Spykesworth was set at liberty. Cressyngham was committed to prison during the King's pleasure. See also 4 Cobb. St. Tr. 281, 306.

Rot. Parl. 7 *Ric.* 2, *nu.* 24 (1383).—This was a similar case, in which Sir William de Elmham and others were accused in Parliament of taking a bribe and surrendering the castle of Burburgh in Flanders. Some of the persons impeached were ordered to pay to the King what they had received, some were committed to prison to be ransomed at the will

of the King, and one William de Farndon was to be in mercy of the King, body and goods, to do with them what he pleased. See also 4 Cobb. St. Tr. 284, 311.

Year Book, Trin. 7 *Hen.* 4, *fol.* 46 (47 seems to be a mistake), pl. 5, 6.—In this case Michael de la Pole, Earl of Suffolk, sued a scire facias against Constance, Countess Marshal, and rehearsed that by suit made to the King by petition in his Parliament at Westminster in the first year of his reign, notwithstanding certain judgments given against his father in the time of King Richard by the assent of the said Parliament, he was made a person able to bear the name of Earl of Suffolk and to inherit and enjoy all the lands which were his said father's in his lifetime; and that by virtue of that ordinance he was seised of certain lands which were (limited) to his father and his heirs during the life of the Countess of Suffolk which were given to his father by the King's letters, &c.; then that he was ousted by colour of an inquest of office taken before the escheator of the county of Norfolk, by which it was found that Thomas (Mowbray), Earl Marshal, who lately committed treason against the King, died seised of the said lands as joint feoffee with the said Countess, then his wife, in fee tail. The Earl of Suffolk claimed that the Countess Marshal should show cause why he, the Earl, should not be restored to possession together with the issues at the same time.

After considerable discussion as to whether the proper remedy was by an assize:

Markham J.: When a man commits high treason all his land in fee simple or fee tail is seizable, and by this seisin the King has the fee and inheritance. If a man has a right he may make it good by petition, &c.

Gascoigne C.J.: The lands of no man shall be seized before he is attainted; that has always been the law.

Markham J.: If a man levying war against the King is killed in battle, his lands may be seized; and similarly if a man after committing treason flies beyond the sea his land may be seized.

Gascoigne C.J.: What you say is not law, for in such a case process shall be put in suit against him until he be attainted as an outlaw and then shall the land be seized.

Le Grand Coustumier de Normandie, ch. 73.—Of treason to the Duke of Normandy suit shall be made in this manner: I, to whom the Duke of Normandy had delivered his castle to guard, make complaint of P. that he was with me in the garrison; that treasonably and feloniously he went by night out of the castle and introduced the enemies of the Duke, from whom I was hard set to escape, &c.

W. H. G.

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JONES AND OTHERS *v.* HATHERTON AND OTHERS.

Licensing Acts—Licence—Renewal—Notice of Intention to oppose—Service on "the holder thereof"—Service on Holder of Protection Order, who became Holder of Licence before Application for Renewal—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 16, *sub-s.* 3.

The Licensing (Consolidation) Act, 1910, s. 16, sub-s. 3, provides that, "subject to the provisions of this section, the licensing justices shall not, where the holder of a justices' licence applies for the renewal of his licence, entertain any objection to . . . . the renewal thereof unless written notice of an intention to oppose the renewal of the licence, stating in general terms the grounds on which the renewal is opposed, has been served on the holder thereof not less than seven days before the commencement of the general annual licensing meeting."

More than seven days before the general annual licensing meeting notice of intention to oppose the renewal of the justices' licence in respect of licensed premises was served on J., who was carrying on the business on the premises under a protection order. Before the licensing meeting the licence was duly transferred to J., and at that meeting he applied for the renewal of his licence:—

Held, that service of the notice upon J., who was the holder of the licence when the application for renewal was made, was service on "the holder thereof" within the meaning of sub-s. 3 of s. 16 of the Act.

CASE stated by quarter sessions.

On January 24, 1916, a protection order or temporary authority to sell intoxicating liquors and carry on business on certain licensed premises was duly granted to Jones under s. 88 of the Licensing (Consolidation) Act, 1910, and he thereupon carried on the business until the general annual licensing meeting held on February 14. On February 2 a notice of intention to object to the renewal of the licence at the general annual licensing meeting was served upon Jones by the superintendent of police, under s. 16, sub-s. 3, of the Act, upon the ground that the premises had been ill-conducted. On February 14, at the special transfer sessions, held before the general annual licensing meeting, the licence was duly transferred to Jones. Later in the day Jones applied at the general annual licensing meeting for a renewal of the licence, and the

justices proceeded to hear evidence in support of the objection. Jones was represented by a solicitor and evidence was called in support of the renewal, but no objection was taken in respect of the validity of the notice of objection; the justices refused to renew the licence. Upon an appeal to quarter sessions it was contended that at the general annual licensing meeting there was no jurisdiction to entertain any objection to the renewal of the licence because at the time when the notice of objection was served upon Jones he was not the holder of the licence, and therefore notice had not been served as required by s. 16, sub-s. 3, of the Act. For the licensing justices it was contended that although Jones was not the holder of the licence when the notice was served upon him, yet notice had been duly served upon him under s. 16, because he had received seven days' notice and was the holder of the licence when the application for renewal was heard; and further that any irregularity in service of the notice of objection had been waived.

The Court of quarter sessions found upon the facts that the grounds of objection to the renewal of the licence had been proved, but held that the service of the notice of objection was invalid and bad in law, and stated this case for the opinion of the Court.

Hon. R. W. Coventry (*Vachell, K.C.*, with him), for the licensing justices. In view of the decision of the Court of Appeal in *Price* v. *James* (1) it must be admitted that Jones was not the holder of the licence when he had only a protection order. He was, however, the holder of the licence when the application for renewal was made, and the proper construction of the words "served on the holder thereof" in sub-s. 3 of s. 16 of the Licensing (Consolidation) Act, 1910, is that they mean the holder of the licence who is applying for the renewal and not merely the person who is the holder when the notice of objection is served. In *Blencowe & Co.* v. *Lord Hatherton* (2) it was decided, under s. 42 of the Licensing Act, 1872, that service of notice of objection upon the person who held the licence at the time of service, but had ceased to be the holder before the licensing meeting and was not the person applying for the renewal, was insufficient; and it would seem to be a

(1) [1892] 2 Q. B. 428. (2) (1907) 96 L. T. 817; 71 J. P. 210.

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necessary conclusion from that decision that "the holder thereof" in this sub-section means the person who is the holder when the application for renewal is made. If this notice is held to be invalid, it would by reason of that decision appear to be impossible to serve notice of objection before the licensing meeting in such a case as the present; and the provisions of sub-s. 4 of s. 16 do not meet this point, for the power given to the justices to adjourn the application for notice of objection to be given is discretionary. In s. 42 of the Act of 1872 the words were "on the holder of such licence," which meant the holder at the time of application for renewal, and in the present Act, which is a consolidating statute, it cannot have been intended to alter the law by the change of the language into "the holder thereof." The intention of this provision is that the person applying for renewal of his licence should have sufficient notice of any objection to the renewal, and that intention will be carried out by construing "the holder thereof" to mean the person who is the holder of the licence applying for its renewal.

Disturnal, K.C., and *Graham Milward*, for Jones. Reading sub-s. 3 as a whole, the plain meaning of the words "served on the holder thereof" would appear to be that the notice must be served upon the person who is the holder of the licence at the time of service, and that those words cannot refer merely to the person who is the holder subsequently at the time of the licensing meeting. Any difficulty which might arise from this construction is met by the provisions of sub-s. 4 which enable the justices to adjourn the application for renewal in order that notice of objection may be given. The decision in *Blencowe & Co.* v. *Lord Hatherton* (1) turned entirely upon the particular facts of that case and is not in any way a decision against this construction of sub-s. 3.

[There was some argument upon the question whether the point as to the validity of the notice had been waived, but as the Court expressed no opinion upon this question it is not thought necessary to report the argument.]

VISCOUNT READING C.J. The question which we have to decide in this case is the meaning to be given to the words "on the holder thereof" in s. 16, sub-s. 3, of the Licensing (Consolidation) Act,

(1) 96 L. T. 817; 71 J. P. 210.

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1910. It is contended for the licensing justices that those words designate the person mentioned in the earlier part of sub-s. 3, that is, the holder of a justices' licence who is applying for a renewal, and that the meaning of the sub-section is that, when he applies for a renewal, notice of opposition must have been served on him not less than seven days before the general annual licensing meeting. In this case the notice was served upon Jones not less than seven days before the general annual licensing meeting. At that meeting Jones was the holder of the justices' licence applying for the renewal of his licence, but when the notice was served he was not the holder of the licence, but had only obtained a protection order. For Jones it is said that, inasmuch as the notice had not been served on him when he was the holder of the licence, the notice was invalid, and consequently the justices had no jurisdiction to entertain the objection and their decision to refuse the renewal was bad. The point raised is that the words " served on the holder thereof " in sub-s. 3 of s. 16 do not necessarily mean the person who is applying for the renewal of the licence, but mean the person who is in fact at the time when the notice is served the person who is the holder of the licence. It is to be observed that in this case there are no merits in this contention. Evidently the object of the Legislature in the earlier Act of 1872 and in this Act was to provide that the renewal of a justices' licence was not to be refused unless the person applying for renewal had had a proper notice that the renewal was to be opposed. The justices themselves may, although no notice has been given, on an objection being made to a renewal, adjourn the hearing to a future day and require the attendance of the holder on that day and then hear the objection as if notice had been given. That is really much the same thing as saying that particulars of objection must be given to the person applying for a renewal in order that he may know what case he has to meet. If the view urged on behalf of Jones is right, it would lead to the absurdity that though the person applying for the renewal had in fact received seven days' notice, yet the knowledge which Jones had by reason of that notice was not the knowledge of Jones who was applying for renewal of his licence and that a distinction must be drawn between the different positions of Jones. Of course the language of the statute might compel me to take

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a view which would seem to me to be absurd and unreasonable, but I do not think that this language does so compel me. I think that the language used in sub-s. 3 means only that the person who is applying for a renewal of his licence must have had at least seven days' notice of opposition, just as if sub-s. 3 had said in terms that the notice is to be served on the person applying for the renewal. I have no doubt that is the true meaning of the sub-section; it is, I think, the only reasonable meaning, and I find nothing in the language to compel me to attribute to the words used a meaning which in my judgment would be unreasonable. The case of *Blencowe & Co.* v. *Lord Hatherton* (1), to which our attention has been called, in my view supports that interpretation of sub-s. 3 and is in no way contrary to it. I come, therefore, to the conclusion that the decision of the quarter sessions on this point was wrong and that the order of the licensing justices refusing the renewal of the licence must stand.

RIDLEY J. I have come to the same conclusion. I think that "the holder thereof" in sub-s. 3 of s. 16 does not mean, in such cases as the present, the former holder of the licence who has no interest in the application for renewal, but means the person who is the holder of the licence when the application is made. It is a strong argument in favour of this construction that it makes the Act easy to administer, whereas the other construction makes it difficult. The case of *Blencowe & Co.* v. *Lord Hatherton* (1) appears to me to be a strong though not direct authority in favour of the view that the person to be served with notice is the holder of the licence when the application is made, because it decides that it is not the former holder of the licence who is to be served. I find a further reason for our decision on looking at the language of s. 42 of the earlier Act of 1872, which provides that the notice is to be "served on such holder," that is, the person who applies for the renewal. The Act of 1910 is a consolidation Act, and very strong reason ought to be shown for holding that it intended to effect a change in the previous law by changing the words into "served on the holder thereof" instead of "served on such holder," and I do not think there is any reason for so holding. I agree, therefore,

(1) 96 L. T. 817; 71 J. P. 210.

that the decision of quarter sessions upon this point was erroneous.

Low J. At the commencement of the general annual licensing meeting Jones was the holder of the licence and applied for the renewal of his licence. The licence had been transferred to him at the transfer sessions held earlier on the same morning. At a proper time before the licensing meeting a notice of opposition had been served on Jones, who was then carrying on the business under a protection order. We are bound by the decision in *Price* v. *James* (1) that the holder of a protection order is not the holder of the licence, and we are asked to say that because Jones was not the holder of the licence when the notice was served on him therefore the service of the notice was bad. In deciding a question like this I think that we must consider the object of the enactment and also, this being a consolidating statute, to some extent the provisions which are consolidated. Upon doing this it seems to me to be clear that the words "served on the holder thereof" in sub-s. 3 are at all events quite ample to include the person who in point of fact is the holder thereof at the time of the application for renewal and whose interests the sub-section was intended to protect.

Appeal allowed.

Solicitors for the licensing justices: *Field, Roscoe & Co., for J. Selby Gardner, Cannock.*

Solicitors for Jones: *Robinson & Bradley, for C. A. Loxton, Walsall.*

(1) [1892] 2 Q. B. 428.

J. H. W.

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SHELFORD *v.* MOSEY.

Shipping—Seaman's Wages and Emoluments—Bonus—Seaman left behind Abroad in Consequence of Alleged Desertion—Validity of Clause in Agreement with Seaman providing for Forfeiture of Bonus on Desertion—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 742—*Merchant Shipping Act*, 1906 (6 *Edw.* 7, *c.* 48), *s.* 28.

By the definition contained in s. 742 of the Merchant Shipping Act, 1894, "wages" include emoluments.

By s. 28, sub-ss. 1, 2, of the Merchant Shipping Act, 1906, if a seaman belonging to any British ship is left behind out of the British Islands the master of the ship is to enter in the official log-book a statement of the amount due to the seaman on account of wages at the time when he was left behind, and on the termination of the voyage at a port in the United Kingdom is to furnish to the superintendent of the port an account of the wages and deliver to him the amount due as shown in the account.

The agreement between the master of a foreign-going ship (the voyage to terminate in the United Kingdom) and the crew contained a clause that "all members of the crew will be paid 15 per cent. war bonus over and above the rates appearing against their names on the articles for the voyage or during the period of the war, i.e., whichever terminates first. . . . . In case of desertion and/or being paid off abroad the above bonuses will be forfeited. The wages entered against the respective names therein represent increases over the company's scale of rates ruling at the outbreak of war, which increases are added as a war bonus":—

Held, that the bonus was part of the emoluments of the seaman and was therefore included in his wages, and that the stipulation that the bonus was to be forfeited was inoperative against a seaman who had been left behind out of the British Islands, his absence being alleged to be due to desertion, inasmuch as the stipulation was contrary to the above provisions in the Acts of 1894 and 1906, and the master was therefore bound to pay to the superintendent of the port where the voyage terminated the amount of the bonus due to the seaman at the time he was left behind.

CASE stated by justices for the county of Essex.

An information was preferred by the respondent, an officer of the Board of Trade and the "proper officer" under s. 28 of the Merchant Shipping Act, 1906, against the appellant, Shelford, master of the British ship *Omrah*, for that he on June 12, 1916, at the Mercantile Marine Office, Tilbury, after the termination of the voyage of the ship at Tilbury on or about June 11, 1916, unlawfully

failed without reasonable cause to comply with the provisions of s. 28 of the Merchant Shipping Act, 1906 (1), in that he having dealt with the account of the wages of a seaman named Fay, the seaman having been left behind out of the British Islands, and the absence of the seaman being alleged to be due to desertion, refused or neglected to deliver to the proper officer, to wit, the superintendent of mercantile marine at the Mercantile Marine Office, Tilbury, the sum of 3*l.* 5*s.*, being the amount due on account of wages as shown on the delivery account furnished by the appellant in respect of the seaman.

By the agreement between the appellant and the crew (including Fay) contained in the ship's articles, and dated February 16, 1916, Fay agreed to serve on board the *Omrah* as hospital attendant on a voyage from London to any ports or places within the limits of 75° north and 65° south latitude, proceeding

(1) Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 28, sub-s. 1: "If a seaman belonging to any British ship is left behind out of the British Islands, the master of the ship shall subject to the provisions of this section—

"(*a*) as soon as may be, enter in the official log-book a statement . . . . of the amount due to the seaman on account of wages at the time when he was left behind; and

"(*b*) on the termination of the voyage during which the seaman was left behind, furnish to the proper officer within forty-eight hours after the arrival of the ship at the port at which the voyage terminates, accounts in a form approved by the Board of Trade, one (in this section referred to as the delivery account) of the . . . . wages and the other (in this section referred to as the reimbursement account) of any expenses caused to the master or owner of the ship by the absence of the seaman in cases where the absence is due to desertion. . . . . "

Sub-s. 2: "The master of the ship shall deliver to the proper officer . . . . subject to any deductions allowed under this section, the amount due on account of wages as shown in that account. . . . . "

Sub-s. 10: "If the master of a ship fails without reasonable cause to comply with this section, he shall (without prejudice to any other liability) for each offence be liable on summary conviction to a fine not exceeding twenty pounds. . . . . "

Sub-s. 11: "The proper officer for the purpose of this section shall be—

"(i.) at a port in the United Kingdom, a superintendent.

. . . . . "

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thence to Brisbane via ports, thereafter trading to ports in any rotation, and to end at any port in the United Kingdom as might be required by the master. Voyage not to exceed three years.

The agreement contained the following clause :—" It is further agreed that all members of the crew will be paid 15 per cent. war bonus over and above the rates appearing against their names on the articles for the voyage or during the period of the war, i.e., whichever terminates first . . . . In cases of desertion and/or being paid off abroad the above bonuses will be forfeited. The wages entered against the respective names therein represent increases over the company's scale of rates ruling at the outbreak of war, which increases are added as a war bonus."

It was conceded, and the justices found as facts, (1.) that Fay was to be treated for the purposes of this case as a seaman left behind out of the British Islands ; (2.) that the proper proportion of wages as distinct from any question of bonus due to him had been tendered by the appellant to the respondent and refused by him.

On the part of the appellant it was contended (inter alia): (*a*) That the bonus in question was not " wages " but consideration for the performance of an entire contract. (*b*) That no part of the bonus accrued due or became payable till the fulfilment of the contract on completion by Fay of the return voyage. (*c*) That by his desertion he had forfeited any rights under the stipulation. (*d*) That if the stipulation was contrary to law no demand for its inclusion in the delivery account would lie, and the seaman could not claim thereunder for the whole or any part of the bonus.

On the part of the respondent it was contended : (*a*) That the bonus was " wages " or " emoluments " as defined by s. 742 of the Merchant Shipping Act, 1894. (1) (*b*) That it therefore accrued

(1) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 114, sub-s. 1 : " An agreement with the crew shall be in a form approved by the Board of Trade, and shall be dated at the time of the first signature thereof, and shall be signed by the master before a seaman signs the same.'

Sub-s. 3 : " The agreement with the crew shall be so framed as to admit of such stipulations, to be adopted at the will of the master and seaman in each case, whether respecting the advance and allotment of wages or otherwise, as are not contrary to law."

Sect. 742 : " In this Act, unless the context otherwise requires the following expressions have

de die in diem and should have been included in the "wages" in the delivery account. (c) That if the bonus were "wages" or "emoluments" it was only liable to forfeiture under the decision of a Court of law and not by virtue of any agreement between the master and the crew.

The justices were of opinion that the sum stipulated for as bonus in the agreement was "wages" within the meaning of the Merchant Shipping Acts and that as "wages" it could not be forfeited by agreement between the master and the seaman, and they accordingly held that the appellant had failed to comply with the requirements of s. 28, sub-ss. 1 and 2, of the Merchant Shipping Act, 1906, and convicted him and imposed a fine of 2*l*.

The question for the opinion of the Court was whether the justices upon the above statement of facts came to a correct determination in point of law.

W. H. Duckworth, for the appellant. The clause providing for the forfeiture of the bonus in case of desertion or payment off abroad is not contrary to law, but, if it is, the clause must be considered as struck out of the agreement, and in that case there is no contract to pay the bonus.

The contract entered into by Fay was an entire contract within the principle of *Cutter* v. *Powell* (1), and he cannot without performing the condition claim the bonus. He cannot claim upon a quantum meruit. The agreement is to give him 15 per cent. provided he is not paid off abroad and does not desert. A person cannot agree to do a certain thing for a certain sum, and then claim the advantage of that contract, if he does not do the thing. A bonus is not the same thing as wages. The bonus is not payable in any event as are wages. Fay was only to be entitled to the bonus on condition that he carried out the entire voyage, and as he did not carry through the entire voyage he is not entitled to any portion of the bonus.

Sir F. E. Smith, A.-G., B. W. Ginsburg, and *G. A. H. Branson*, for the respondent, were not called upon.

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the meanings hereby assigned to them; (that is to say,)

. . . . . .

"'Wages' includes emoluments;"

(1) (1795) 6 T. R. 320.

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LORD READING C.J. The sole question in this case is whether or not a bonus agreed to be paid to a seaman as recorded in the ship's articles is to be treated as wages, or whether it can be regarded as something apart from wages. That is a question of importance, because in this time of war, in the majority of cases, masters of ships make some agreement to pay extra or higher wages than were usually paid before the war, or stipulate that they will pay a bonus. In the present case the seaman did not return to the ship and, whatever the reason was, did not complete the voyage. He did an act which put an end to the agreement. Under these circumstances at common law he would not be entitled to any wages, but by the provisions of the Merchant Shipping Act, 1906, he is entitled to be paid his wages up to the time he leaves the ship.

It is admitted that that is the law with regard to wages, and it seems to me to follow inevitably that it is also the law with regard to bonus. "Bonus" in such a case as the present one is in truth nothing else but a euphemism for "addition to wages." There may be special reasons for calling it a bonus—e.g., it may be a convenient method of conveying to a sailor the fact that he is being paid something extra during, and only during, the war. On behalf of the appellant it has been contended that the bonus is not an addition to wages, because under the clause in the contract the sailor is entitled to payment of it only if he returns with the ship, inasmuch as the clause contains the words "In cases of desertion and/or being paid off abroad the above bonus will be forfeited." If that clause can stand and can be regarded as part of the contract, that contention would be right. The seaman has not returned, and according to the words of the contract he has forfeited his bonus. But the statute enacts that there shall be no forfeiture of the wages of a sailor. Consequently, if the clause provides for the forfeiture of wages, it is inoperative because it is illegal.

The effect of the argument upon behalf of the appellant is that either the whole clause, although it would defeat the right of the sailor to payment unless he returns home with the vessel, is operative, or, if it is to be regarded as inoperative, the whole clause must be deleted, in which case the seaman would still not be entitled to any bonus. But the answer is that that is not the law as enacted

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by the Merchant Shipping Act, 1906. The bonus is, like wages, a payment agreed to be made to the seaman for sailing in the vessel. If there were an agreement for wages to be paid to a sailor containing a stipulation that if he deserted, or were paid off abroad, he should get nothing, it is perfectly clear law that the stipulation would be of no avail whatever. Parliament interfered for the protection of the sailor—who, whatever his merits and qualifications may be in other spheres of life, does not as a rule pay too much attention to documents he signs—and said, in effect, "This man, although he may agree to a stipulation of that kind, shall not be held to it. The stipulation shall be invalid and he shall be paid his wages notwithstanding the stipulation and notwithstanding that a shipmaster or shipowner may have obtained his signature to a contract containing the stipulation which puts him absolutely at the mercy of the shipmaster." The stipulation is invalid, but the agreement to pay the wages remains.

That disposes of the whole question, because in my judgment the bonus cannot be separated from the wages. That the bonus is nothing but an addition to the wages is clear from the words in the clause: "The wages entered against the respective names therein represent increases over the company's scale of rates ruling at the outbreak of war, which increases are added as a war bonus." Therefore the bonus is part of the sailor's emoluments, and the Acts of 1894 and 1906 apply to wages and emoluments, i.e., to payments which may not strictly come within the word "wages."

It is not necessary to define "emoluments," which is a term not usually applicable to wages payable to a sailor, but it was meant to include something paid to him for his work over and above the wages actually agreed to be paid. The definition of the word "wages" in s. 742 of the Merchant Shipping Act, 1894, makes it clear that "wages" include emoluments, and I hold a bonus also, although the statute does not expressly use the word "bonus." That being so, the stipulation giving the right of forfeiture of the bonus falls to the ground, and the seaman is entitled to be treated as if it had been stated in the articles that he shipped on the terms of being paid stated wages plus 15 per cent. The justices came to a right conclusion, and the appeal fails.

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Low J. The only question in this case is whether the bonus agreed to be paid to the seaman was or was not wages. If it was wages, it could not be forfeited by agreement between the master and the seaman. The interpretation clause in the Merchant Shipping Act, 1894, states that wages include emoluments. It was admitted that the bonus was, at all events, an emolument. The justices have taken an entirely correct view in their construction both of the statute and of the agreement. In my judgment, therefore, this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Botterell & Roche.*
Solicitor for respondent: *Solicitor to Board of Trade.*

J. E. A.

C. A.

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Nov. 1, 2.

[IN THE COURT OF APPEAL.]

NOLISEMENT (OWNERS) *v.* BUNGE & BORN.

Shipping — Charterparty — Lay Days — Completion of Loading before Expiration of Lay Days—Detention of Ship after Loading—Charterers' Obligation to present Bills of Lading.

By a charterparty a steamer was to load a cargo and proceed therewith to one of certain named ports of call, at the master's option, for orders (unless orders were given on signing bills of lading) to discharge at a port on the Continent within certain limits. By clause 13 the steamer was to be loaded at the rate of a certain number of tons per day, otherwise demurrage was to be paid by the charterers; and by clause 16 despatch money was to be paid "for all time saved in loading" at the rate of 15*l.* a day. By clause 21 the master was to sign bills of lading in the form indorsed thereon at any rate of freight that the charterers might require, but any difference in amount between the bill of lading freight and the total gross chartered freight was to be settled at the port of loading before the steamer sailed. By clause 22 orders as to the port of discharge were to be given to the master within twenty-four hours after notice of arrival at the port of call, and for any detention after that the charterers were to pay 30*s.* per hour.

The steamer loaded in eight days—nineteen days before the expiration of the lay days—and the master applied to the charterers for the bills of lading and orders, but they were not forthcoming

until the expiration of three days from the completion of the loading, owing to the charterers, who had decided to give orders for the port of discharge on signing bills of lading, not having made up their minds as to the port to which they would order the steamer. The steamer sailed on the expiration of the third day. It was agreed that the charterers had the right to keep the steamer for twenty-four hours after completion of the loading for the purpose of settling accounts, and the shipowners claimed damages for the detention of the steamer during the two remaining days :—

Held, that, after the loading had been completed, the charterers were not entitled to keep the steamer for the full period of the lay days; that they were under an obligation to present bills of lading to the master for signature within a reasonable time—which by the agreement was twenty-four hours—after completion of the loading, and they had committed a breach of contract in having delayed to do so for two days beyond the twenty-four hours; and that, there being no agreed rate of damages specified in the charterparty for the breach, the shipowners were entitled to recover the loss actually sustained.

Held, also, that the charterers were entitled to despatch money for the whole of the nineteen days saved in the loading.

Decision of Atkin J. [1916] 1 K. B. 805 reversed.

APPEAL from the judgment of Atkin J. upon an award by an umpire in the form of a special case; reported [1916] 1 K. B. 805.

By a charterparty which was headed "Chamber of Shipping River Plate Charterparty, 1914, Homewards," and dated February 1, 1915, it was agreed between the owners of the steamship *Nolisement* and E. A. Bunge and J. Born as charterers (clause 2) that the steamer should after arrival at Monte Video or at an Argentine port, not south of Bahia Blanca, proceed as ordered by the charterers or their agents to Buenos Aires or La Plata and there receive from them a full and complete cargo, which the charterers bound themselves to ship, not exceeding what she could reasonably stow and carry.

Clause 4: "Being so loaded the steamer shall with all reasonable speed therewith proceed to St. Vincent (Cape Verdes) or Las Palmas or Teneriffe (Canary Islands) or Madeira or Dakar, at the master's option, for orders (unless these be given to him by charterers on signing bills of lading) to discharge at a safe port on the Continent between Bordeaux and Havre both included (Rouen excluded) or at Marseilles, Algiers, Barcelona, Carthagena, or Valencia" on being paid freight.

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Clause 11 : " Orders for the first loading port or place shall be given within four running hours after receipt of written or telegraphic application of the master or agents to the charterers or their agents in Buenos Aires . . . . upon notice of arrival in ballast in free pratique at Monte Video or at an Argentine port not south of Bahia Blanca . . . . otherwise all time lost to the steamer through waiting for orders shall be reckoned as loading time, or in the event of this charter being cancelled shall be paid for at the demurrage rate hereinafter mentioned . . . . "

Clause 12 : " Lay days shall not commence before 1st March, 1915, unless charterers begin loading sooner and should the steamer not be ready to load by 6 P.M. on 31st March, 1915, charterers shall have the option of cancelling this charterparty . . . . "

Clause 13 : " The steamer shall be loaded at the rate of 225 tons per running day up to the first 3000 tons, and at the rate of 400 tons per running day for any quantity above 3000 tons, Sundays and holidays excepted, otherwise demurrage shall be paid by the charterers at the rate of twopence sterling per gross register ton per running day for steamers of up to 4000 tons dead weight cargo capacity and threepence sterling per gross register ton per running day for steamers of over 4000 tons dead weight cargo capacity. Time for loading shall commence to count twelve hours after written notice has been given by the master or agents on any day (Sundays and holidays excepted), between 9 A.M. and 6 P.M., to the charterers or their agents that the steamer is ready to receive cargo, but the said notice to be given at the first port or place of loading only."

Clause 16 : " Despatch money (which is to be paid to charterers before steamer sails) shall be payable for all time saved in loading (including Sundays and holidays saved) at the rate of " (so far as applicable to this case) " 15*l.* sterling per day for steamers of over 4000 tons bill of lading weight . . . . "

Clause 20 : " The freight shall be paid as follows, viz. :—Sufficient cash for steamer's use, if required by the master (not exceeding one-third of the freight) to be advanced by charterers on signing bills of lading . . . . on account of freight at current rate of exchange for approved commercial bills on London, subject to 3% three per cent.) to cover interest, insurance, and other charges,

and the balance of freight on the right and true delivery of the cargo . . . . "

Clause 21: "The master to sign bills of lading in the form indorsed hereon at any rate of freight that the charterers or their agents may require, but any difference in amount between the bill of lading freight and the total gross chartered freight, as above, shall be settled at port of loading before the steamer sails . . . . "

Clause 22: "Orders as to port of discharge are to be given to the master within twenty-four hours after receipt by consignees of master's telegraphic report to consignees (whose name and cable address are to be given in writing by charterers to the master before sailing from the last loading port) of his arrival at the port of call, and for any detention, waiting for orders, after the aforesaid twenty-four hours, the charterers or their agents shall pay to the steamer 30*s.* sterling per hour . . . . "

By clause 39 all disputes arising out of the contract were, unless the parties agreed on a single arbitrator, to be referred to two arbitrators, with power to them to appoint an umpire.

The steamer began to load on March 8, and her lay days, by virtue of clause 13 of the charterparty, would expire on April 5; but she in fact finished loading on March 16 at 4 P.M., and at that time the master applied to the charterers for his bills of lading and orders as to destination, but the same were not forthcoming. The steamer was kept waiting for the bills of lading and orders for three days, namely, until 4 P.M. on March 19, owing to the charterers, who had decided to give orders for the discharging port on signing bills of lading, not having made up their minds as to the port to which they should order the steamer. The steamer sailed at 5 P.M. on March 19. It was agreed between the parties, and the umpire found, that the charterers had the right to keep the steamer for twenty-four hours for the purpose of settling accounts, and the dispute between the parties, which formed the subject-matter of the arbitration under clause 39 of the charterparty, had reference to the two remaining days that the steamer was kept waiting, and in respect of which the owners contended that they were entitled to damages.

The umpire found that the steamer was kept two days over and above the said twenty-four hours owing to a breach by the charterers of their obligation to present to the captain the bills of

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lading and orders as to the port of discharge. He further found that the owners paid to the charterers on accounts made out by the charterers despatch money pursuant to clause 16 of the charterparty for nineteen and a quarter days on the footing that the loading of the steamer was completed at 4 P.M. on March 16; that the charterers included in their account for despatch money the time the captain was waiting for his bills of lading and orders; and that the same was not paid under any mistake of fact.

The charterers contended (so far as material) that, the loading time granted them by the charterparty not having been exceeded, the shipowners were not entitled to claim for demurrage or detention, but only to a return of the despatch money for the two days which was paid under a mistake of fact; that the damages, if any, which the shipowners were entitled to claim were assessable at the demurrage rate in the charterparty and not on the value of the vessel under the special circumstances of the freight market existing at the time of loading; and that in any case in calculating the damages (so as to reduce or countervail the same) regard must be had to the terms of clause 22 and the consequent saving to the shipowners, by reason of waiting for orders at the loading port, of time which would otherwise have been lost in calling for orders and waiting twenty-four hours or more for orders under clause 22.

The shipowners contended that on completion of the loading the charterers were bound within twenty-four hours to present to the captain his bills of lading and orders and so enable the steamer to sail; that on the expiration of the said twenty-four hours the steamer was entitled to proceed to sea, and that, having been prevented for two days from doing so owing to the wrongful action of the charterers in not giving orders and presenting the bills of lading, they were entitled to claim damages for such detention; alternatively, that, having paid the charterers despatch money for the unexpired time within which they were bound to load the steamer, the loading time must be taken to have expired on the completion of the loading, and that for any time during which the steamer was prevented by the charterers from sailing they were entitled to damages, subject to allowing the charterers twenty-four hours for making out the accounts and the bills of lading and giving orders.

Subject to the opinion of the Court the umpire accepted the owners' and rejected the charterers' contentions and awarded a sum of 300*l.* to the owners. If the Court should be of opinion that his award was wrong, and that the charterers' contention that the despatch money only should be returned was correct, the umpire found that there was due to the owners from the charterers 30*l.*; and if the Court should be of opinion that the award was wrong and that the charterers' contention was wrong as to the return of the despatch money but was right that the damages should be assessed on the basis of the demurrage rate in the charterparty, the umpire found that there was due to the owners from the charterers 94*l.* 14*s.*

Atkin J. held that the charterers were entitled to detain the steamer for the full period of the lay days notwithstanding that she had completed her loading before the expiration of that time, and that therefore they had not committed a breach of contract; but that they were not entitled to retain the despatch money for the two days during which they detained the steamer, and that the sum of 30*l.* only was due to the owners.

The shipowners appealed.

Sir Maurice Hill, K.C., and *Raeburn*, for the shipowners. After the steamer had been loaded the charterers were not entitled to detain her during the remainder of the lay days. They were bound to present the bills of lading to the master at once, that is, within a reasonable time after completion of the loading: *Oriental Steamship Co.* v. *Tylor* (1); *Moel Tryvan Ship Co.* v. *Kruger* (2), and thus enable the steamer to sail. A reasonable time for making out the accounts and presenting the bills of lading has been agreed at twenty-four hours. By clause 4 of the charterparty the steamer was bound to sail upon completion of the loading; and clauses 20 and 21 show that the charterers were to present bills of lading to the master for signature. The master could not sail until the bills of lading were presented to him for signature. The charterers therefore committed a breach of contract in delaying for two days before presenting bills of lading to the master, and as there is no measure of damages for that delay fixed by the charterparty, the loss of the

(1) [1893] 2 Q. B. 518. (2) [1907] 1 K. B. 809, 819.

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daily value of the steamer is the true measure of damages : *Moorsom* v. *Bell.* (1) The umpire has assessed that loss at 300*l.* The demurrage rate is not applicable because it refers to the time, if any, during which the steamer is detained by the charterers after the lay days have expired. It is admitted that the charterers are entitled to receive 15*l.* a day despatch money under clause 16 of the charterparty for the time saved in loading, and they are therefore entitled to despatch money for the two days during which the steamer was wrongfully detained. [*Oakville Steamship Co.* v. *Holmes* (2) was also referred to.]

Leck, *K.C.*, and *R. A. Wright* (*Le Quesne* with them), for the charterers. By clause 13 of the charterparty the charterers are allowed a certain number of lay days during which they can detain the steamer for their own purposes at the port of loading, and they do not commit a breach of any term of the contract, either express or implied, if they detain the steamer during the whole period of the lay days. The lay days are allowed for the charterers' benefit. Charterers may load at the beginning of the lay days, or they may postpone the loading until towards the end of the lay days, and in either case they are entitled to detain the steamer during the whole period of the lay days. The charterers therefore had the right to keep the steamer for the whole of the lay days without making any payment. Clause 21 gives the charterers the right to require, if they choose, bills of lading to be signed by the master. It is a stipulation in their favour and imposes no obligation upon them ; the obligation is upon the master to sign bills of lading at any rate of freight that the charterers may require. There has been no breach by the charterers of any term of the contract imposing upon them a liability to pay damages. Moreover the master might under clause 21 have signed a bill of lading in the form indorsed on the charterparty at the rate of freight specified in the charterparty, and then under clause 4 have sailed.

Next, assuming that the charterers are liable, the delay was caused by the charterers not having determined upon the port to which the steamer should be ordered for discharge, and if this delay had not taken place the steamer would have had to go to a port of call for orders, where under clause 22 of the charterparty she

(1) (1811) 2 Camp. 616. (2) (1899) 5 Com. Cas. 48.

might have been detained for twenty-four hours or longer. This delay was avoided, and this circumstance ought to be taken into consideration in assessing the damages. Under that clause a delay of twenty-four hours was allowed at the port of call, with a liability to pay 30*s.* an hour for any delay afterwards. The damages ought to be measured having regard to that sum.

Further, if the charterers are liable for the two days' delay, the shipowners are only entitled to the return of the two days' despatch money paid to the charterers, there having been a total failure of consideration for the payment; or at most the shipowners are only entitled to 94*l.* 14*s.* at the demurrage rate specified in clause 13.

No reply was called for.

SWINFEN EADY L.J. This is an appeal from the judgment of Atkin J. upon an award stated in the form of a special case. The question arises in respect of a charterparty dated February 1, 1915, whereby the *Nolisement* was to proceed to the River Plate and there load a full and complete grain cargo. The charterparty provides for the rate at which the steamer is to be loaded, and for despatch money. The ship was loaded in eight days, and the charterers earned despatch money for nineteen and a quarter days. They were paid on that basis, but the ship's sailing was delayed for three days after the loading was completed. It was agreed between the parties, and the umpire found, that the charterers had the right to keep the steamer for twenty-four hours for the purpose of settling accounts. Therefore the detention of the steamer for one of the three days was justified, and the claim was in respect of the remaining two days. The umpire states why she was detained. She was unable to sail owing to the charterers, who had decided to give orders pursuant to clause 4 on signing bills of lading, not having made up their minds as to the port of discharge. The shipowners' claim for the two days' detention was referred to arbitration. The umpire made his award in an alternative form. He first found that the claim of the shipowners was well founded and awarded a sum of 300*l.* to the owners. In the alternative, if his award was wrong, and the charterers' contention that the despatch money only should be returned was correct, he found that 30*l.* was payable to the owners. And in the further alternative, if his award was wrong,

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and if the charterers' contention was wrong as to the return of the despatch money but was right that the damages should be assessed on the basis of the demurrage rate in the charterparty, he found that 94*l.* 14*s.* was due to the owners. The learned judge before whom the award came held that the charterers were not liable in respect of the detention of the ship as they were entitled to detain her during all the lay days, that is to say, during the time required for the loading of the ship had she been loaded at the rate prescribed in the charterparty. At the same time he held that the charterers could not claim despatch money in respect of the two days, the shipowners having gained nothing in respect thereof by the accelerated rate of loading; and that therefore the despatch money in respect of those two days was money paid without consideration, and the charterers must return it to the shipowners.

The shipowners appeal from that judgment. They contend, first, that they are entitled to damages for the detention of the vessel; and, secondly, that there is no contract rate of damages, that the damages are at large, and that therefore the umpire was entitled to award the sum of 300*l.*

Clause 4 of the charterparty provides that the steamer being loaded shall with all reasonable speed proceed to St. Vincent or certain other named ports, at the master's option, for orders unless these be given to him by the charterers on signing bills of lading. Therefore the charterers had the option, on signing bills of lading, of naming the port of discharge; and the umpire finds that the charterers had decided to exercise that option and to name the port of discharge on signing bills of lading before the ship sailed, but that they had not made up their minds as to the particular port. The provision for lay days and the rate of loading is contained in clauses 12 and 13 of the charterparty. [The Lord Justice read the material parts of those clauses.] Eight days were occupied in loading, and that left nineteen and a quarter days in respect of which despatch money was payable. Under clause 13 demurrage is payable if the steamer is not loaded at the agreed rate. The steamer was in fact loaded at an accelerated rate, and her detention for the two days after being loaded would not give rise to a claim for demurrage under that clause. Clause 13 therefore does not give any contract rate for detention of the steamer

after she was fully loaded. Clause 16 provides for despatch money, which the vessel earned and received; and clause 20 provides for advance freight. Clause 21 provides for the signing of the bills of lading. [The Lord Justice read the clause.] Therefore the master was under an obligation to sign bills of lading at any rate of freight that the charterers or their agents might require. That no doubt was a provision for the benefit of the charterers, who could have required the master to sign bills of lading before the ship sailed. In those circumstances it was the duty of the charterers to prepare and present the bills of lading for signature. In *Moel Tryvan Ship Co.* v. *Kruger* (1) Sir Gorell Barnes, after considering the terms of the contract, said that he was proposing to apply to the terms of the contract one or two well-known propositions; and the second proposition he put thus: "That, as a matter of business—and it necessarily must be so—the charterer has to prepare the bills of lading; he has to select how many parcels of goods he wishes the shipment to be divided into, and whether he will send the bills of lading to certain specific persons named or have them made out to order and indorse them. It is obvious that it must be for the charterer, if he wishes to have bills of lading signed, to make out the bills of lading and tender them for signature." In the present case it is essential that the bills of lading should be made out by the charterers, because the rate of freight to be specified therein is to be the rate required by them.

That being their duty, the next question is, within what time ought the charterers to make out the bills of lading and present them to the master? In *Oriental Steamship Co.* v. *Tylor* (2) Lord Esher M.R. said: "Now with regard to what time is the signing of the bill of lading to be determined? What is the time at which, or from which, you are to calculate the necessity or the obligation to sign the bill of lading? It is not from the sailing of the ship; it is from the loading of the cargo. No captain has authority to sign a bill of lading unless there is cargo on board, and he has only authority to sign for the cargo which is on board. But when there is a cargo on board, what is the time within which the bills of lading are to be signed? The bills of lading are almost invariably signed before the ship sails. Take an ordinary charter, where there are

(1) [1907] 1 K. B. 819. (2) [1893] 2 Q. B. 523.

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not the words 'or agent' in it, where the bills of lading are to be signed by the captain only; is it not elementary to say that those bills of lading are to be signed before the ship sails? It is obvious, in almost every case, the bill of lading is signed before the ship sails, and the time from which you are to determine the obligation as to the time of signing the bill of lading is from the time of loading the cargo. Therefore, the time for the signing of these bills of lading is to be calculated from the time of the loading on board." Then a little later (1) he points out that "the charterer here ought to have presented that bill of lading almost immediately." That is to say, there was an obligation on the charterers to present the bills of lading within a reasonable time after the ship was loaded. Not having done so, was it a breach of duty by the charterers to detain the ship? Atkin J. has held that it was not. In his judgment he says (2) that "the true view is that the charterer has the stipulated period of lay days during which he may delay the ship at the port of loading without incurring liability for demurrage or for damages; in other words, he commits no breach by detaining the ship for that particular period." It is true that, if all the lay days are consumed in loading, there is no breach for which the charterer is liable; but in a charterparty in this form, where the ship is loaded at an accelerated rate, the charterer has no right to say that, as he might have taken more time to load the ship, he can detain her for the rest of the period which he might have occupied in loading without being liable in damages for the detention. In a charterparty in this form the charterer has no such right; and after the expiration of the one day allowed by the parties it was a breach of contract on the part of the charterers to detain the ship by not presenting the bills of lading and enabling the ship to sail. The learned judge has held that the acceptance of the despatch money did not prevent the charterers from saying that they were under no obligation to let the ship sail before the lay days expired, but that the charterers could not retain the two days' despatch money. The charterers, in my opinion, had earned and were entitled to retain the despatch money. Under clause 16 despatch money, which is to be paid to the charterers before the steamer sails, "shall be payable for all time saved in loading." The time was saved in loading. When once it

(1) [1893] 2 Q. B. 525. (2) [1916] 1 K. B. 809.

was ascertained that nineteen and a quarter days were saved in loading, the despatch money became payable for that time, and the charterers were entitled to receive and retain it, although they might also be liable in damages for afterwards detaining the ship.

The next question is whether there is any contract rate of damages. I can find none. I have already pointed out that the demurrage payable if the steamer does not load within the contract time is not applicable. The umpire having found that the steamer was unreasonably detained for two days at the port of loading, the damages are such sum as may reasonably be taken to have been in the contemplation of the parties at the time they made the contract as the probable result of the breach of it. A commercial umpire has awarded 300*l.* in damages. It is said that the damages are practically nil because, by reason of the two days' detention at the port of loading, a detention at the port of call was avoided, as otherwise the ship would have had to call for orders at a port where she would be detained for at all events twenty-four hours, and perhaps longer, and therefore it was merely a question of detaining the steamer for two days at one port instead of at another. That is a matter to be considered by the umpire in arriving at the amount of damages. The steamer might not have been detained for that time at the port of call. It was put before him, because one of the contentions of the charterers was that in calculating the damages regard must be had to the terms of clause 22 and the consequent saving to the shipowners, by reason of waiting for orders at the loading port, of time which would otherwise have been lost in calling for orders and waiting for twenty-four hours or more for orders under clause 22. The umpire may have thought that, having regard to the state of business, the ship would not have been detained for that time or anything like it; but that was a matter for him to take into consideration with all the other facts of the case in ascertaining the amount of damages. In my opinion there is no contract rate; neither the demurrage rate nor the despatch money rate applies; and therefore the damages were open to be assessed by the umpire, and his award for 300*l.* must stand. The appeal must be allowed.

BANKES L.J. I agree. The main contentions are, first, that the charterers were under no obligation to present bills of lading to

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the master, but, whether this were so or not, that, as the two days during which the ship was detained fell within the lay days, they were not liable to pay any damages; and, secondly, that with regard to the payment of despatch money the right ground upon which to put that question was that there had been a total failure of consideration, and that the money was properly repayable to the shipowners.

I will take this last point first. The provision in the charterparty dealing with despatch money is contained in clause 16: "Despatch money shall be payable for all time saved in loading." That is a short and convenient way of expressing what the parties mean. "Time saved in loading" must mean any portion of the full time allowed by the charterparty for loading which remains after the vessel has been fully loaded; and for that time, according to the plain language of the clause, despatch money is payable. Therefore under clause 16 despatch money had to be paid for the full period which remained between the completion of the loading and the last day allowed under clause 13 for the operation of loading. If the construction adopted by Atkin J. with regard to the first question were correct, this extraordinary result, as it seems to me, would follow: despatch money would be payable under the terms of the charterparty in respect of a period of time during which the ship was not free to sail owing to the action of the charterers. That difficulty was felt by the charterers at the arbitration, and they endeavoured to escape from it by saying that the despatch money had been paid under a mistake of fact. That solution of the difficulty obviously failed. Then another attempt was made, which was accepted by Atkin J. It was said that the despatch money ought not to be retained by the charterers because there was a total failure of consideration. I am unable to accept that. The consideration for the payment of the despatch money was diligence in loading; and, so far from there being a total failure of consideration, the facts show that the consideration was fully executed. In these circumstances I can see no ground for coming to the conclusion that despatch money in respect of these two days was not properly payable.

I now come to the first question, and that depends upon the true construction of this particular charterparty. Atkin J. treated clause 13 as if it gave some right to the charterers in respect of the ship not limited to the time actually occupied in loading, but which

extended to the full period which might have been, but which in fact was not, occupied in loading. In my opinion that is not the correct reading of clause 13. The clause does not specify any number of lay days, and, so far from giving the charterers a right, it seems to me that the correct view of the clause is that it places them under an obligation to load at a certain minimum rate, with the further obligation that if they take longer to load they must pay demurrage at a certain rate. It may be said indirectly to confer a right on the charterers because of the obligation which it places upon them ; but the primary effect of the clause is that which I have stated. If they fail to perform the obligation to load within the time they pay demurrage. If they fulfil the obligation and do not occupy the full time allowed they receive despatch money. If they occupy the exact time allowed they neither pay demurrage nor receive despatch money. If that is the correct view of the clause, the right upon which the learned judge founded his decision does not exist, and the charterers have no right to say that, though they did not occupy the full time allowed by the charterparty for loading, they were still in a position to claim the right to detain the ship in the sense of refusing to take action which would allow her to depart so long as the full loading time allowed was not exceeded.

The remaining point is this. Assuming that view of the contract to be correct, namely, that when the ship is once fully loaded any right, if it is a right, of the charterers in respect of the ship ceases, the question arises as to what is the position of the parties with reference to the bills of lading. In practice in almost every case the charterers and the shipowners desire that there shall be bills of lading, and a certain amount of time must be occupied in preparing the necessary documents and presenting them to the master. In this particular case the parties have agreed that a reasonable time would be twenty-four hours. In these circumstances, is there any obligation on the charterers to present bills of lading to the master ? I should certainly have thought that there was ; but this case is not dependent upon ordinary commercial practice. It seems to me, upon the correct reading of clause 21, that an obligation is imposed upon the charterers to present bills of lading and upon the master to sign them. This obligation is not inserted in the interest of the charterers only ; the provisions of clause 21 are for the mutual

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benefit of both parties. In this particular contract it was obviously within the contemplation of the parties that a bill of lading would have to be presented by the charterers to the master. The question then is, within what time? If it is within the contemplation of the parties that the act shall be done, there must be an implied condition that it shall be done within a reasonable time. The parties have agreed that twenty-four hours was a reasonable time. In these circumstances there was, upon the facts as found, a breach by the charterers of the implied condition that they would present a bill of lading to the master for signature within a reasonable time, and as they failed to comply with that condition they are liable in damages. The damages do not come within any provision of the charterparty fixing the amount for this particular breach. In these circumstances the damages are at large, and the umpire has assessed them at 300*l*. The appeal must be allowed.

LAWRENCE J. I am of the same opinion. The question depends upon whether, as the charterers contend, the lay days provided by clauses 12 and 13 are to be taken as a period during which the charterers are entitled to have the ship absolutely at their disposal, or whether they are only a means of calculating the rate of loading, so that, if the rate does not rise to that level, demurrage becomes payable. In my opinion they are merely days given for the operation of loading. That is made clear by clause 16, which provides for despatch money in the event of the loading being at a more rapid rate than the rate as calculated under clause 13. In this case the loading was completed within a shorter time, and despatch money was earned and paid. It does not seem to me to be possible to say that the unexpired lay days were still at the charterers' disposal. Directly the ship was finally loaded it became the duty of the charterers within a reasonable time to present bills of lading for signature. If they did not do so, but delayed the ship for an unreasonable time before presenting the bills of lading, that was a breach of duty for which damages are recoverable. It is agreed that a reasonable time was twenty-four hours. After that the ship was delayed for two days. It is said that the ship might have sailed without waiting for bills of lading. That is not a correct view of the charterparty. Clause 21 clearly means that the master

has to sign bills of lading at the port of loading before the steamer sails. It seems to me to be impossible to read this charterparty as intended to give the charterers the remainder of the lay days after the loading was completed as a time during which the ship was to be at their disposal for any purpose they pleased. They could only detain her for that time in the operation of loading, and if they detained her otherwise they were committing a breach of duty.

With regard to the measure of damages, that seems to me to be a point of some difficulty, but upon the whole I think that there is no agreed rate. The demurrage provided by clause 13 is for detention caused by delay in loading beyond the time allowed for that purpose. There is no sum fixed in the charterparty for this particular detention, and consequently the damages are at large and the umpire was entitled to award the sum of 300*l.*

Appeal allowed.

Solicitors for shipowners: *Church, Rackham & Co., for Donald Maclean & Handcock, Cardiff.*

Solicitors for charterers: *Thomas Cooper & Co.*

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THE KING *v.* THE COMMANDING OFFICER OF MORN HILL CAMP, WINCHESTER.

Ex parte FERGUSON.

Habeas Corpus—Jurisdiction of Inferior Court—Detention—"Ordinarily resident in Great Britain"—Military Service Act, 1916 (5 & 6 *Geo.* 5, *c.* 104), *s.*1, *sub-s.* 2—*Military Service Act*, 1916 (*Session* 2) (6 & 7 *Geo.* 5, *c.* 15), *s.* 1, *sub-s.* 1.

The decision of an inferior Court upon a matter the decision of which is entrusted to that Court cannot be questioned by means of a writ of habeas corpus.

By s. 1, sub-s. 1, of the Military Service Act, 1916 (Session 2), every male British subject who is for the time being ordinarily resident in Great Britain and within certain specified limits of age is, with certain exceptions, deemed to have been duly enlisted in His Majesty's forces and to have been transferred to the reserve.

By s. 1, sub-s. 2, of the Military Service Act, 1916, if any question arises in any legal proceeding under the Army Act and other statutes whether a man is a man who is under this section deemed to have been enlisted and transferred, the Court (in this case a magistrate) may require the man to give evidence on the question, and if satisfactory evidence is not given to the contrary the man shall be deemed to have been enlisted and transferred.

An Irishman who had temporarily got work in England was brought before a magistrate for failing to comply with an order calling him up from the reserve for permanent service. In pursuance of powers conferred upon him the magistrate handed him over to the military authorities as being a person who for the time being was ordinarily resident in Great Britain and as such deemed to be enlisted and transferred to the reserve. The military authorities detained him :—

Held, that a writ of habeas corpus would not lie to question the decision of the magistrate.

Reg. v. *Bolton* (1841) 1 Q. B. 66 applied.

RULE NISI for a writ of habeas corpus ad subjiciendum.

From the affidavits of Ernest Ferguson, the prosecutor, and of Margaret Ferguson, his mother, in support of the application for the rule nisi the following facts appeared :—

The prosecutor was an Irishman. He was born on May 1, 1890, at 32, Fleet Street, Belfast. His father was William Ferguson, a gas meter inspector, and his mother was Margaret Ferguson ; both were of Irish birth and lived at 32, Fleet Street aforesaid.

The prosecutor was educated in Belfast. In the year 1904 he was apprenticed for ten years to a firm of paper rulers in that city. Having fully served his apprenticeship, he left the employment of that firm in August or September, 1914, and entered the service of a firm of printers in Londonderry, where he remained until October, 1915. In October, 1910, he became and continued to the present time a member of a trade union in Belfast. He registered in Belfast under the National Registration Act, 1915. From the date of his birth until October, 1915, he lived with his mother in Belfast, except for the short time while he was in Londonderry. His father died in 1905.

In October, 1915, owing to bad labour conditions in Ireland, the prosecutor sought temporary employment in England and entered the employment of a firm at Apsley Mills, Apsley End, Hertfordshire, where he remained until February, 1916.

In February, 1916, he arranged to return to Ireland, but owing to the disturbed condition of that country his mother advised him to postpone his return for a short time in the hope that in the meanwhile the conditions in Ireland would improve. He thereupon applied for the position of a machine ruler in the service of a firm of manufacturing stationers in London and entered their employment on March 4, 1916. On August 26, 1916, while still in that employment, he was arrested by the police as an absentee under the Military Service Acts, 1916. (1) On August 28, 1916, he was brought before the magistrate at the Thames Police Court, who decided that he was liable for service under the Act. He was then handed over to the military authorities and detained by them at Morn Hill Camp, Winchester.

The rule nisi called upon the commanding officer of the Morn Hill Camp to show cause why a writ of habeas corpus should not issue directed to him to have the body of the prosecutor immediately before this Court to undergo and receive all and singular such matters and things as the Court should consider of and concerning him in this behalf on the grounds that :—

(1.) The arrest was illegal, as the Military Service Act, 1916, did not apply to the prosecutor, who was not ordinarily resident in Great Britain ;

(1) See note on p. 181, post.

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(2.) That the magistrate's commitment was illegal inasmuch as the magistrate had no jurisdiction to make such an order in respect of a person not within the purview of the statute;

(3.) That the commanding officer of the camp and the Secretary of State for War had neither power nor authority in law to hold the prosecutor in detention.

Branson showed cause. This rule was obtained to question the jurisdiction of the magistrate. The more appropriate writ would have been a certiorari, but that point is not pressed. The real question in this and similar cases is whether the magistrate's jurisdiction begins when a state of facts actually exists or when a state of facts is alleged. His decision must in all cases be based on certain facts. The question in each case is whether the finding of those facts is submitted to him or not. If it is, then he acts within his jurisdiction even though his finding of the facts may be erroneous: *Reg.* v. *Bolton.* (1) This is the explanation of the cases of *Brittain* v. *Kinnaird* (2), *Cave* v. *Mountain* (3), and *Allen* v. *Sharp* (4) on the one hand, and *Weaver* v. *Price* (5), *Liverpool Gas Co.* v. *Everton* (6), and *Rex* v. *Bradford* (7) on the other. If a magistrate comes to a wrong decision upon the facts the remedy, if there be any, is by way of special case. In the present case it is clear that the jurisdiction of the magistrate is not confined to cases of men who are ordinarily resident in Great Britain; it begins when a question arises "whether any man is a man who is under this section"—s. 1 of the Military Service Act, 1916—"deemed to have been enlisted." That includes the question whether the man is ordinarily resident in Great Britain.

Even if jurisdiction is conferred on the magistrate only in case the man is ordinarily resident in Great Britain, the prosecutor in this case answers that description.

Holford Knight, in support of the rule. A magistrate cannot confer jurisdiction upon himself by finding facts of which there is no evidence. There is no evidence that the prosecutor was ordinarily resident in the United Kingdom. It was his intention to leave

(1) 1 Q. B. 66.
(2) (1819) 1 Brod. & B. 432.
(3) (1840) 1 Man. & G. 257.
(4) (1848) 2 Ex. 352.
(5) (1832) 3 B. & Ad. 409.
(6) (1871) L. R. 6 C. P. 414.
(7) [1908] 1 K. B. 365. See also *Rex* v. *Bloomsbury Income Tax Commissioners* [1915] 3 K. B. 768.

Great Britain as soon as the conditions in Ireland permitted of his return to that country. The jurisdiction of the magistrate may be questioned by this writ, and it has been chosen as the most expeditious remedy.

LORD READING C.J. In this case the magistrate has held that the prosecutor was "for the time being ordinarily resident in Great Britain" within the meaning of s. 1 of the Military Service Act, 1916 (Session 2). The prosecutor has sought to question that decision by means of a writ of habeas corpus. If the jurisdiction exercised by the magistrate is a jurisdiction which has been conferred upon him by the statute, then, notwithstanding that he may have come to a wrong decision on the facts or upon the law, it is clear that his decision cannot be questioned by this procedure. In the present case there is no doubt as to the jurisdiction of the magistrate. It is not suggested that he was not the proper tribunal to deal with the case. It is suggested that he came to a wrong conclusion. But if an erroneous decision of a magistrate entitled a party detained by the magistrate's order to come to this Court for a writ of habeas corpus, that writ would furnish a ready means of appealing to this Court from every decision of a magistrate ordering the detention of an offender. If there were no means of questioning a magistrate's order, there might be some ground for invoking the assistance of this Court in the way chosen in this case, but there is a well-known procedure by way of special case whereby the decisions of magistrates can be inquired into. In my opinion we have no jurisdiction to interfere in such a case as the present. The law on this matter is well stated by Lord Denman C.J. in *Reg.* v. *Bolton* (1): "The case to be supposed is one like the present, in which the Legislature has trusted the original, it may be (as here) the final, jurisdiction on the merits to the magistrates below; in which this Court has no jurisdiction as to the merits either originally or on appeal. All that we can then do, when their decision is complained of, is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law. Even if their decision should upon the merits be unwise or unjust, on these grounds we

(1) 1 Q. B. 66, 72.

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Lord Reading C.J.

cannot reverse it." It is true that *Reg.* v. *Bolton* (1) was a case of a certiorari, but the same principles apply in the case of a habeas corpus. We cannot, therefore, interfere in this case.

I would only add that if it had been possible for us to go into the case on the affidavits I should have been clearly of opinion that there was material upon which the magistrate could infer that the prosecutor was for the time being ordinarily resident in Great Britain. The rule must be discharged.

DARLING J. I am of the same opinion. The words "for the time being ordinarily resident in Great Britain" do not import that the person should have been born or should have lived all his life in Great Britain. The question whether a person comes within those words is a question of fact for the magistrate to decide. No objection has been taken or could have been taken to his jurisdiction. He had ample jurisdiction to decide the question. Whether he decided it rightly or wrongly we are not called upon to determine. In fact he decided the question against the prosecutor, who then applied for a writ of habeas corpus. If the magistrate had had no jurisdiction in the matter, this writ might have been an available remedy; but such writs are not to be obtained by confusing jurisdiction with merits. The writ of habeas corpus does not lie wherever a Court decides wrongly. It lies where a person is detained without justification. In the present case the justification is the decision of a magistrate. If a magistrate comes to a wrong decision in fact or in law he may be asked to state a case; if he refuses he may be ordered to do so. The prosecutor therefore had a remedy. He desired a more expeditious remedy, but that is no reason why this Court should be permitted to enlarge its jurisdiction. The Court is not to be called upon to entertain appeals from all magistrates who decide wrongly as soon as the decision is given.

ATKIN J. I agree. No doubt on an application for the writ of habeas corpus the Court ordinarily may inquire into the presence or absence of jurisdiction in the Court which orders the detention of the prosecutor. But the question here is whether the prosecutor makes out any case of want of jurisdiction. The case

(1) 1 Q. B. 66.

arises under the Military Service Acts of 1916. By s. 1, sub-s. 1, of the later Act every male British subject who "for the time being" is ordinarily resident in Great Britain and within specified limits of age is, subject to certain exceptions, deemed to be duly enlisted in His Majesty's forces. By s. 1, sub-s. 2, of the earlier Act the Army Act and other Acts apply to any man deemed to have been enlisted; and if any question arises in any legal proceeding whether a man is one who is deemed to have been enlisted, the Court may require the man to give evidence; and if satisfactory evidence is not given to the contrary the man shall be deemed to have been enlisted. In the present case the prosecutor appeared before the proper Court. A magistrate has to deal with the matter, and the question he has to investigate is "whether a man is one who is deemed to have been enlisted." His jurisdiction is not limited to the question whether a man resident in Great Britain is one who is deemed to have been enlisted; it extends to "any man," whether in fact he is or is not resident in Great Britain, as to whom a question arises whether he "is one who is . . . . deemed to have been enlisted." The man has to give satisfactory evidence to the contrary, otherwise he is to be deemed to have been enlisted. Therefore the magistrate has complete jurisdiction in the matter, whether in fact the man is resident in Ireland or in Great Britain, although he could not find a man to be an absentee who gave satisfactory evidence that he was not "ordinarily resident in Great Britain" within the meaning of these Acts. The only question is whether the man gives such evidence, and that is a question which the magistrate has the fullest jurisdiction to investigate. If we had to say whether there was any evidence of residence in Great Britain I should hold that there was ample evidence.

Rule discharged.

Solicitors for prosecutor: *Ellis & Co.*
Solicitor for defendant: *The Treasury Solicitor.*

NOTE.—Military Service Act, 1916 (Session 2) (6 & 7 Geo. 5, c. 15), s. 1, sub-s. 1: "Every male British subject who has at any time since August 14, 1915, been, or for the time being is, ordinarily resident in

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Great Britain, and who for the time being has attained the age of eighteen years and has not attained the age of forty-one years, shall, unless he either is for the time being within the exceptions set out in the First Schedule to the Military Service Act, 1916 (in this Act referred to as the principal Act), as amended by this Act or any subsequent enactment, or has attained the age of forty-one years before the appointed date, be deemed as from the appointed date to have been duly enlisted in His Majesty's regular forces for general service with the colours or in the reserve for the period of the war, and to have been forthwith transferred to the reserve . . . . "

Sub-s. 2: " All the provisions of the principal Act, as amended by this Act, with the exception of those defining the appointed date, shall, so far as applicable, extend to men to whom this section applies in the same manner as to men to whom section 1 of that Act applied . . . . "

Military Service Act, 1916 (5 & 6 Geo. 5, c. 104), s. 1, sub-s. 2: " The Army Act . . . . and the Reserve Forces Acts, 1882 to 1907, and any orders and regulations made thereunder, shall apply accordingly to any man who is so deemed to have been enlisted and transferred to the reserve; and if any question arises in any legal proceeding under any of those Acts, orders, or regulations whether any man is a man who is under this section deemed to have been enlisted and transferred to the reserve or not, the Court may require the man to give evidence on the question, and if satisfactory evidence is not given to the contrary the man shall be deemed to have been so enlisted and transferred;

" Provided that—(*a*) where the question, whether a man is a man who, under this section, is deemed to have been enlisted and transferred to the reserve or not, is raised on proceedings in respect of an offence alleged to have been committed by a man as a member of the reserve whilst he was a member of the reserve in pursuance of the transfer under this Act, or in respect of any alleged failure to comply with any order calling him up from the reserve for permanent service, that question shall be decided only on proceedings before a civil Court . . . . "

By s. 190, sub-s. 31, of the Army Act " civil Court " means a Court of ordinary criminal jurisdiction and includes a Court of summary jurisdiction.

By the joint operation of ss. 15 and 16 of the Reserve Forces Act, 1882 (45 & 46 Vict. c. 48), and s. 154 of the Army Act, a constable may apprehend on reasonable suspicion a reservist who fails to appear when called up for permanent service and bring him before a Court of summary jurisdiction. The Court may cause him to be delivered into military custody.

W. H. G.

In re GEEN.
Ex parte PARKER.

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Nov. 6.

Bankruptcy—Deed of Arrangement—Supervening Bankruptcy—Trustee of Deed of Arrangement—Costs of Trustee—"Expenses properly incurred"—Deeds of Arrangement Act, 1914 (4 & 5 *Geo.* 5, *c.* 47), *s.* 21.

Where a deed of arrangement is superseded by the bankruptcy of the debtor, the expenses of the trustee of the deed which are by s. 21 of the Deeds of Arrangement Act, 1914, a first charge on the debtor's estate, are strictly limited to those incurred by him in the performance of the duties specifically imposed on him by the Act. The section gives him no lien in respect of other matters where no lien existed before the Act, but he may be allowed reasonable compensation for other services rendered by him whilst trustee of the deed which have resulted in benefit to the estate.

THIS was an application that raised the question of what expenses are to be allowed under s. 21 of the Deeds of Arrangement Act, 1914, to the trustee of a deed of arrangement which is superseded by the bankruptcy of the debtor, in these circumstances.

On November 10, 1915, the debtor, who was a trader, executed a deed of assignment of all his property to one Macmeikan upon trust for the benefit of his creditors, which was duly registered under the Deeds of Arrangement Act, 1914.

On or about November 24 the mortgagee of the book debts of the debtor's business applied by summons under the Courts (Emergency Powers) Act, 1914, for leave to enforce her security, which was opposed by Macmeikan.

On November 25 a meeting of the creditors convened by Macmeikan refused to approve the deed of assignment and requested the debtor to file his petition in bankruptcy. Accordingly on November 26 a receiving order was made against the debtor on his own petition, and at the same time he consented to immediate adjudication, and one Parker became the trustee in bankruptcy.

In January, 1916, Macmeikan applied to Parker for payment of his charges and expenses as trustee under the deed of arrangement, and claimed to retain 30*l.* 4*s.* 7*d.* of book debts he had

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collected against (1.) 29*l.* 8*s.*, his charges under the deed, and (2.) 36*l.* 15*s.*, his solicitors' bill of costs for work done for him as trustee under the deed. The 29*l.* 8*s.* was made up of his time for six days at 3*l.* 3*s.* a day and his clerk's time for ten days at 1*l.* 1*s.* a day, and included the preparation of a statement of the debtor's affairs, the sending of forty-two notices to creditors convening the meeting of November 25, opening a banking account in the name of the debtor's estate, and interviews with and instructions to his solicitors with respect to the mortgagee's claim. The solicitors' bill of costs included the registration of the deed in accordance with the provisions of the Act, advising Macmeikan on the mortgagee's claim, and taking instructions for drawing and filing two affidavits in opposition to the mortgagee's summons, and attending the summons. Parker was advised that the claim could not be allowed and, after considerable correspondence, applied to the Court for an order on Macmeikan to pay over the 30*l.* 4*s.* 7*d.* less such a sum as the Court might think fit to allow him as expenses properly incurred under s. 21 of the Deeds of Arrangement Act, 1914.

Tindale Davis, for Parker. The question depends upon s. 21 of the Act, which provides that, where a deed of arrangement is avoided by reason of the bankruptcy of the debtor, any expenses properly incurred by the trustee under the deed in performance of any of the duties imposed on him by the Act shall be allowed or paid by the trustee in bankruptcy as a first charge on the estate. It is submitted on the construction of the section that the expenses to be allowed to the trustee of the deed must be strictly limited to the expenses incurred by him in the performance of the duties imposed on him by the Act. The only duties imposed on him by the Act are those mentioned in ss. 3, 7, 11, 13, 14, 15, 16, 20, and 24, and the only duty under the Act that he has done has been the opening of a banking account in the name of the debtor's estate as directed by sub-s. 4 of s. 11, for which he has charged 16*s.* 8*d.* All the other items in his account are not in respect of duties imposed by the Act, and the charges in his solicitors' bill of costs do not come under any of the provisions of the Act. He has no doubt done some acts which have been of service to the estate, which the trustee is willing to adopt and pay for on the

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principle of *In re Simonson.* (1) He has been offered and has refused 5*l.*, and the trustee desires the Court to assess such a sum as it considers reasonable remuneration for the services.

Giveen, for Macmeikan. It is much too narrow a view of s. 21 to limit the words " expenses properly incurred " to the statutory duties for the first time expressly imposed by the Act on the trustee of a deed of arrangement, and it is submitted that they should include any expenses properly incurred by him in performing the duties of a trustee under the deed. Sect. 2 requires the deed to be registered, and, although the Act does not say that the trustee shall register the deed, it is submitted that it is the duty of the trustee to register the deed and to take a full copy of it in order that he may know his duties under the deed. Then s. 3 requires the deed to be accepted by the creditors, and the trustee convened the meeting of the creditors for that purpose and prepared a statement of the debtor's affairs for the meeting. Secondly, the trustee in bankruptcy has treated the respondent as his agent and has adopted some of his acts, and for that he should receive reasonable remuneration. Here he has done more than merely keeping the estate together. He employed his solicitors to resist the application of the mortgagee of the book debts who had notice of an act of bankruptcy when she gave notice to the book debtors, and he passed that information on to the trustee in bankruptcy and enabled him to effect a compromise by which 300*l.* was obtained for the estate which otherwise would have been lost. The out-of-pocket expenses exceed 5*l.* It is not necessary to show that all the acts of the respondent have benefited the estate if there was a fair probability of their doing so : *Ex parte Shaw* (2) ; and if the trustee in bankruptcy will not allow reasonable remuneration the Court can give it : *In re Foster.* (3)

HORRIDGE J. This is an application by the trustee in bankruptcy to recover the sum of 30*l.* 4*s.* 7*d.* in the hands of the respondent, the trustee under a deed of arrangement executed by the debtor on November 10, 1915. The bankruptcy of the debtor supervened within three months of the date of the deed. The

(1) [1894] 1 Q. B. 433, 437. (2) (1846) De G. 242.
(3) (1895) 72 L. T. 364.

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Horridge J.

respondent says that he is entitled under s. 21 of the Deeds of Arrangement Act, 1914, to a considerable sum of money. The only point of real importance in this case is, what is the meaning of s. 21 ? It provides " where a deed of arrangement is avoided by reason of the bankruptcy of the debtor, any expenses properly incurred by the trustee under the deed in the performance of any of the duties imposed on him by this Act shall be allowed or paid him by the trustee in the bankruptcy as a first charge on the estate." Mr. Tindale Davis says that the words " duties imposed on him by this Act " ought to be strictly limited to the matters which the trustee under the deed is for the first time directed to do by several sections of the Act. Mr. Giveen says that the word " duties " means any duties which he may properly discharge as the trustee under the deed, and that one of those duties is the registration of the deed. Before the Act of 1914 there were no matters in respect of which a trustee under a deed was entitled to have any allowance or payment as of right. My view is the true meaning of s. 21 is that an allowance is to be made in respect of matters which a person acting as a trustee under a deed has for the first time to do under the Act, whether the deed turns out to be a good or a bad deed. In this case the only duty the trustee has done is under s. 11, sub-s. 4, which provides " all moneys received by a trustee under a deed of arrangement shall be banked by him to an account to be opened in the name of the debtor's estate." He has opened a banking account in the name of the debtor's estate, and his charge for performing that duty is 16*s.* 8*d.* I do not think the Act intends to give a trustee under a deed of arrangement any lien on the estate in respect of any matters where he would not have had a lien before the Act.

The next point is this. The trustee in bankruptcy says " I have adopted certain work done by the trustee under the deed, and I am willing in respect of that to make him an allowance under the principle laid down in *In re Simonson*." (1) Now what was done was this. The debtor had mortgaged his book debts, and the mortgagee, wishing to enforce her security, took out a summons under the Courts (Emergency Powers) Act, 1914, and that was opposed by the trustee under the deed, and then afterwards he gave certain

(1) [1894] 1 Q. B. 433.

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information to the trustee in bankruptcy which enabled him to make a satisfactory compromise with the mortgagee. It is very hard indeed to say what is the value of the work done by the trustee under the deed of arrangement. The parties prefer that I should say what is a sufficient sum to allow, and I think if I give the respondent 10*l.*, which with the 16*s.* 8*d.* will make 10*l.* 16*s.* 8*d.*, this will be sufficient remuneration. The respondent has taken a wrong view of the construction of s. 21, but, as this is the first case in which the construction of the section has been discussed, I will not order him to pay the costs of the motion, and I think the proper course is to direct him to pay over the 30*l.* 4*s.* 7*d.* after deducting the 10*l.* 16*s.* 8*d.*

Solicitors: *Oliver, Richards & Parker; W. Norris & Co.*

H. L. F.

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Nov. 22.

Limitations, Statute of—Tithe Rent-charge—"Rent"—Modus or Composition—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, *c.* 27), *ss.* 1, 29—*Tithe Act*, 1836 (6 & 7 *Will.* 4, *c.* 71), *s.* 67.

The tithe rent-charge substituted for tithe by s. 67 of the Tithe Act, 1836, is rent within the definition of "rent" in s. 1 of the Real Property Limitation Act, 1833, and is not a modus or composition within the exception to that definition.

Irish Land Commission v. *Grant* (1884) 10 App. Cas. 14 followed.

APPEAL from Bath County Court.

Asplen, the respondent to the appeal, was the vicar of the parish of Marshfield. He applied in the county court under the Tithe Act, 1891, for an order for the recovery from the appellant, Pullin, of two years' arrears of tithe rent-charge in respect of certain land of which the appellant was alleged to be the owner. By a re-apportionment made in 1854 the land in question became charged with a tithe rent-charge of 10*s.* in favour of the vicar of Marshfield.

The appellant filed a special defence to the application, alleging

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(1.) that she was not the owner of the land, and (2.) that the claim was barred by the Real Property Limitation Act, 1833. (1)

The county court judge held that the tithe rent-charge was not rent within the definition in s. 1 of the Real Property Limitation Act, 1833, but was a composition within the exception to that definition, and that it was therefore unnecessary to decide whether the claim to the arrears was in fact barred by the statute, and he made an order for the recovery by the respondent from the appellant of the amount claimed. This appeal was against that order.

E. P. Hewitt, K.C., and *Weatherly*, for the appellant. Tithe rent-charge is a yearly sum of money issuing out of lands formerly charged with tithe, which by s. 67 of the Tithe Act, 1836, was substituted for tithe. It is a periodical sum of money charged upon or payable out of land within the definition of " rent " in s. 1 of the Real Property Limitation Act, 1833, and it is not a composition or modus within the exceptions in that section : *Irish Land Commission* v. *Grant* (2) ; Darby and Bosanquet's Statutes of Limitations, 2nd ed., pp. 283, 284, 480 ; Lightwood's Time Limit on Actions, p. 27. A composition is where by agreement land has been discharged from payment of tithes and some other land or real compensation, i.e., a money payment based on land, has been given in lieu of the tithe. A modus existed where by immemorial usage or prescription a particular manner of tithing was allowed, different from the general law of taking tithes in kind. The tithe rent-charge in this case is owned by a spiritual corporation sole, and, therefore, by s. 29 of the Real Property Limitation Act, 1833, the period of limitation is sixty years.

A. Grant, K.C., and *L. F. Potts*, for the respondent. At the time the Real Property Limitation Act, 1833, was passed there was no

(1) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 1 : " The . . . . word ' rent ' shall extend to . . . . all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole) ; . . . ." By s. 29 no action for the recovery of lands or rents shall be brought by a spiritual or eleemosynary corporation sole after the determination of a period of two incumbencies and six years, or sixty years, from the time at which the right to bring the action shall first have accrued.

(2) 10 App. Cas. 14.

such thing in England as a tithe rent-charge, for tithe rent-charges were not created till the Tithe Act, 1836. A tithe rent-charge is a money payment made instead of tithe. It is a composition or a modus within the exception to the definition of rent in s. 1 of the Act of 1833; the only distinction being that a composition originated in an agreement and a modus by immemorial custom, whereas a tithe rent-charge is the creation of statute. The decision of the House of Lords in *Irish Land Commission* v. *Grant* (1) does not apply to this case. The House of Lords in that case was dealing with an Irish, not an English, tithe rent-charge. The law as to tithe in Ireland was not the same as in England. There had been in Ireland before 1833 statutory compositions in lieu of tithes, and the Tithe Rent-charge (Ireland) Act, 1838 (1 & 2 Vict. c. 109), expressly substituted rent-charges for compositions, and therefore, as Lord Selborne pointed out in *Irish Land Commission* v. *Grant* (2), it was impossible to hold that the new rent-charge was either in name or in nature a composition within the meaning of s. 1 of the Act of 1833. But in England the tithe rent-charge created by s. 67 of the Tithe Act, 1836, was not substituted for a composition but for the tithe itself, and therefore the reasoning of Lord Selborne does not apply to it, and, being of the same nature as a composition or a modus, there is no ground for holding that it is not a composition or modus within the exception in s. 1 of the Act of 1833. The county court judge was therefore right in holding that the Act of 1833 afforded no answer to the claim in these proceedings. [*Dean of Ely* v. *Bliss* (3) was also referred to.]

Hewitt, K.C., replied.

LUSH J. In this case an application was made in the county court under the Tithe Act, 1891, for the recovery of two years' arrears of a tithe rent-charge issuing out of certain land. Two defences to the application were raised—first, that the appellant was not the owner of the land in question, and, secondly, that the claim was barred by the Real Property Limitation Act, 1833. The first defence was abandoned at the hearing; the second was relied on. The county court judge gave judgment for the applicant, the

(1) 10 App. Cas. 14. (2) 10 App. Cas. 31.
(3) (1852) 2 D. M. & G. 459.

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respondent to this appeal, on the ground that the claim was not a claim for rent as defined by s. 1 of the Real Property Limitation Act, 1833, but for a composition belonging to a spiritual corporation sole, to which that Act does not apply. Sect. 1 of the Act provides that the word " rent " shall extend " to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole)." If, therefore, this tithe rent-charge is a composition, as the county court judge has held, the statute affords no answer to the claim. Is it a composition ? The matter stands thus : When the Real Property Limitation Act, 1833, was passed there were tithes, compositions, and moduses, but there was no such thing as a tithe rent-charge. Three years later the Tithe Act of 1836 was passed, which by s. 67 provided that thenceforth, instead of tithes, there should be payable, by two equal half-yearly payments, a sum of money " in the nature of a rent-charge issuing out of the lands charged therewith." Therefore the Legislature when dealing with the commutation of tithes described the money payment, which was to be made instead of the tithe, not as a composition or a modus, but as a payment " in the nature of a rent-charge." There is no doubt that the sum claimed in these proceedings is money issuing out of land, and, therefore, unless the applicant can satisfy us that, when created, it was a modus or composition, the Act of 1833 applies to it, and the right to payment is liable to be extinguished by non-payment for sixty years : see s. 29 of the Act of 1833. Even if there were no authority on the point, I should have thought that the true description of this sum of money is that given in s. 1 of the Act of 1833, namely, a periodical sum of money charged upon or payable out of lands. It is not, in my opinion, either a modus or a composition. But a similar question arose in *Irish Land Commission* v. *Grant*. (1) That was an appeal to the House of Lords from the Court of Appeal in Ireland, and no doubt certain considerations arose in that case which are not applicable here, because, as Lord Selborne pointed out, the law as to tithes was not the same in Ireland as in England. But with regard to the meaning of modus and composition Lord Selborne said (2) : " Is it then a ' composition ' ? I cannot think so, merely because it is a statutory substi-

(1) 10 App. Cas. 14. (2) 10 App. Cas. 30.

tute for a former right of a different legal nature, which was so denominated; nor do I think that any aid towards that conclusion can properly be derived from the natural meaning of the word itself. To 'compound' a debt or claim, is to accept, in satisfaction of it, something less than, or something different from, that which may be claimed as of right—generally by way of compromise or agreement. In that sense, a fixed statutory rent-charge, created by way of commutation or extinguishment of tithes (or of a composition for tithes), is not itself a composition." Pausing there, it seems to me clear that Lord Selborne was of opinion that the statutory substitute for tithe which the Legislature has described as a half-yearly payment of money "in the nature of a rent-charge" is not a composition, still less a modus. But it has been contended by Mr. Grant for the respondent to this appeal that if one reads what Lord Selborne subsequently said it will be seen that his observations have no application to a case like the present, which is governed by English and not by Irish law, and it is said that, according to English law, the payment in the nature of a rent-charge, which is made instead of tithes, is really a composition. At first I was inclined to think that there was some force in that argument. What Lord Selborne said in the next paragraph to that which I have read was: "I have no doubt, both from the known technical use of the word before 1833, and from its association with 'moduses' in the exception from the definition of 'rent' contained in the Statute of Limitations, that what the Legislature in the statute had directly in view were compositions real; but as the statute extends to Ireland, and as the Act 4 Geo. 4, c. 99 had established in Ireland temporary 'compositions for tithes' (eo nomine), which, under 2 & 3 Will. 4, c. 119, had been replaced by fixed and permanent 'compositions in lieu of tithes' (also eo nomine), I am disposed so far to accept the appellants' argument, as to hold that the exception in the Statute of Limitations extended to that class of compositions, when belonging to a spiritual or eleemosynary corporation sole." I would point out in answer to Mr. Grant's argument that, even assuming those observations are applicable to this case, I do not think that Lord Selborne was intending to express any final view on the matter, but the real answer to the argument is that Lord Selborne was there expressing his view with regard to

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Lush J.

compositions real, and he went on to say that, having regard to the nature of the Irish legislation, the exception in s. 1 of the Act of 1833 applied not only to compositions real, but extended to that class of compositions in lieu of tithes which had been created in Ireland by the Legislature,when they belonged to a spiritual corporation sole. What the House of Lords really decided in *Irish Land Commission* v. *Grant* (1) was that when the Legislature substituted for tithe a periodical payment in the nature of a rent-charge it did not make that payment a composition within the meaning of the exception to the definition of "rent" in s. 1 of the Act of 1833. In my opinion, therefore, the sum of money claimed in these proceedings comes within the definition of "rent" in that section, and, being rent, the claim is one which is capable of being barred if there has been no payment or acknowledgment within the period mentioned in s. 29 of the Act. That question of fact was not decided by the county court judge, and the case must therefore go back for a new trial.

BAILHACHE J. I am of the same opinion. My brother Lush has so completely covered the ground that it is not necessary for me to add anything.

Appeal allowed.

Solicitors for appellant: *Collyer-Bristow & Co., for Wood & Awdrey, Chippenham.*

Solicitors for respondent: *Tucker & Martin, for Tucker & Dyer, Bath.*

(1) 10 App. Cas. 14.

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1916
Nov. 24.

FERGUSON *v.* INLAND REVENUE COMMISSIONERS.

Revenue—Undeveloped Land Duty—Land purchased for Brickworks—Erection of Buildings—Portion of Land held in Reserve for Brick-Earth—Temporary Use for Agricultural Purposes—Land "used bona fide for any business"—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 16.

Sect. 16, sub-s. 2, of the Finance (1909-10) Act, 1910, provides that land shall be deemed to be "undeveloped land" if it has not been developed by the erection of dwelling-houses or of buildings for the purposes of any business, trade, or industry other than agriculture (but including glasshouses or greenhouses), or is not otherwise used bona fide for any business, trade, or industry other than agriculture. Land comprising ninety-three acres was purchased between 1896 and 1899 for the purpose of brickworks. The purchaser erected buildings for that purpose on a portion of the land comprising forty-nine acres. The remainder of the land was let on agreements for short terms in three plots as arable land and nursery gardens. Brickmaking was carried on in the buildings and on the forty-nine acres, but in order to obtain a proper return for the capital expended on the buildings it was found that it would be necessary to continue working the brickyard for thirty years, and that the brick-earth in the three plots, which were temporarily let for agricultural purposes, would be required and was necessary as a reserve for the successful working of the undertaking:—

Held, affirming the decision of Atkin J. [1916] 2 K. B. 553, that the three plots had not been "developed" by the erection of the buildings; that they were not "otherwise used bona fide for any business, trade, or industry other than agriculture"; and, therefore, that they were subject to assessment to undeveloped land duty.

Principles laid down in *Inland Revenue Commissioners* v. *Duke of Devonshire* [1914] 2 K. B. 627 and in *Brake* v. *Inland Revenue Commissioners* [1915] 1 K. B. 731 applied.

Appeal from the decision of Atkin J. (1)

The appellant, who appealed against an assessment to undeveloped land duty, was the receiver appointed by the mortgagees of one Hills, who between the years 1896 and 1899 purchased about ninety-three acres of land in the parish of Enfield for the purpose of establishing brickworks, and who erected buildings for that

(1) [1916] 2 K. B. 553.

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purpose costing about 36,000*l.* on a part of the land consisting of about forty-nine acres in area. The remainder of the land was let on agreement for short terms for agricultural or nursery garden purposes. The manufacture of bricks was carried on in the buildings and on the forty-nine acres until 1911, when Hills failed, and since then money had been spent in gradually improving and renovating the plant and buildings. It was proved before the referee, on appeal from whose decision the case came before Atkin J., that the brick-earth in about five out of the forty-nine acres was still unworked, and would be sufficient for the purpose of carrying on the works for five years, but that in order to obtain a proper return for the capital expended upon the buildings it would be necessary to continue working the brickyard for thirty years, and therefore that the brick-earth in the remainder of the land, which had been let off on short terms for agricultural purposes and nursery gardens, was necessary as a reserve of material for the successful working of the undertaking. Atkin J. decided (affirming the decision of the referee) that the remainder of the land over and above the forty-nine acres comprised in the brickfield was not "developed" by the erection of the buildings within the meaning of s. 16, sub-s. 2, of the Finance (1909-10) Act, 1910 (1); that it was not "otherwise used bona fide for any business, trade, or industry other than agriculture" within the meaning of the section; and that it was therefore subject to assessment to undeveloped land duty. The receiver appealed.

E. P. Hewitt, K.C., and *W. Allen*, for the appellant. The whole of the land purchased by Hills, on part of which the buildings were erected, was bought for the purpose of the business of brickmaking, and has therefore been developed by the erection of buildings for the purpose of trade within the meaning of s. 16, sub-s. 2, of the Act. The buildings would be useless and unsaleable apart from such an amount of land containing brick-earth as is essential to the effective

(1) Sect. 16, sub-s. 2, of the Finance (1909-10) Act, 1910: "For the purposes of this part of this Act, land shall be deemed to be undeveloped land if it has not been developed by the erection of dwelling-houses or of buildings for the purposes of any business, trade, or industry other than agriculture (but including glass-houses or greenhouses), or is not otherwise used bona fide for any business, trade or industry other than agriculture."

carrying on the trade from a business point of view. The referee has found that the brick-earth under this particular land is essential to the carrying on as a commercial undertaking of the brickmaking business.

In *Inland Revenue Commissioners* v. *Duke of Devonshire* (1) Scrutton J. said that the site of a building together with such an amount of adjoining land as is essential to its use is "developed" by the erection of the building. Further, it is submitted that the land should be regarded as being "used bona fide for the business, trade, or industry" of brickmaking. The section does not say "exclusively used." The brick-earth contained in the land is really stock in trade held in reserve for the business, the surface being temporarily used for agricultural purposes. [*Brake* v. *Inland Revenue Commissioners* (2) was also referred to.]

Sir F. E. Smith, *A.-G.*, and *Sheldon*, for the respondents, were not called upon.

LORD COZENS-HARDY M.R. This is an appeal from the judgment of Atkin J., and it raises a question whether undeveloped land duty is or is not payable by the appellant in respect of certain portions of land to which I must refer.

The property in question is at or near Enfield. In or about 1896 up to 1899 a certain quantity of land, roughly ninety-three acres, was acquired by a Mr. Hills, and he erected on a portion of that property, which is conveniently marked yellow on the plan which is before us, certain buildings suitable for brickmaking. He satisfied himself, no doubt, that there was brick-earth on the spot or in the immediate neighbourhood. He was an adventurous man, and he erected large and expensive buildings upon which he spent upwards of 36,000*l*. Considerable portions of the property which he so purchased are severed by a road from that which is coloured yellow, and in fact nothing but the forty-nine acres which are coloured yellow has been used, in any proper sense of the word, for brickmaking. There is one part of three acres odd coloured blue; there is another part of twenty-three acres odd coloured green; there is another part of eighteen acres odd coloured red. They have not been used in this sense, that the earth

(1) [1914] 2 K. B. 627, 639. (2) [1915] 1 K. B. 731.

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has not been broken; nothing has been dug up; no arrangements with regard to the actual working of the brickfield have been entered upon in those portions of the land. The referee has found the facts which I have shortly stated. He says that in the land coloured yellow there are practically five acres of brick-earth unworked which would last five years. He says that in fact no bricks at all have been made here since 1911 or 1912. But it is said that the views of Mr. Hills were so magnificent that he spent 36,000*l.* upon these buildings, and he will not get what I think the referee calls an adequate return or a proper return in a commercial sense for the expenditure unless he can treat all the land coloured red, green, and blue on the plan as in the nature of a store of raw material. And it is contended that the effect of erecting these buildings is to make all this land, the whole of the ninety-three acres, free from undeveloped land duty. [The Master of the Rolls then read s. 16, sub-s. 2, and continued :]

It is said by counsel for the appellant that in order to consider whether the erection of the buildings is sufficient to make the whole of these lands free from undeveloped land duty you must see first of all what was in the mind of Hills, who between fifteen and twenty years ago apparently thought it might be possible to use the whole of the land for the purpose of brickmaking. I think that is altogether a wrong view. I cannot think that the intention which a man has for developing at a future date—it may be many years hence—land for getting the raw materials is a matter which should be taken into consideration at all. When you find a building erected for the purposes of trade you do not have regard merely to the four corners of the building any more than you do so in the case of a dwelling-house as in *Inland Revenue Commissioners* v. *Duke of Devonshire* (1); you must have regard to what at the time is reasonably necessary for the enjoyment of the property for the purpose for which it is to be used. I do not doubt that the erection of the sheds and other things for the furnaces, or whatever they were, for the purpose of the brickfield, would have entitled a certain portion at least of the land coloured yellow to be free from undeveloped land duty although not a brick could be made on it. In the case of a dwelling-house

(1) [1914] 2 K. B. 627.

it need not be occupied; but if buildings are erected for the purpose of trade, then you must consider what is the nature of the business, what is wanted for the purpose, and look at it in that way. One illustration which I think was given was this: A ropemaker requires a certain length of run in order to twist the flax or hemp, or whatever it is the rope is made of. So much of the adjacent land as would reasonably be necessary to enable that business to be carried on would be ancillary to the building itself. But to say that the doctrine applies to the case of extracting the raw material from the substance of the earth itself is what I cannot for a moment follow. It is not long ago that we had in this Court—I rather think on an appeal from Scrutton J.—a case where china-clay was taken from Dartmoor in a line of pipes several miles long to Ivybridge, where the china-clay was dealt with at works erected for the purpose. Now, could it be said that by the user of the mill at Ivybridge you were entitled to say that the whole tract of Dartmoor through which the liquid came to make the china-clay was necessary for making an effective use from a business point of view of the capital expended on the works, and therefore the whole of that land ought to be free from undeveloped land duty? I think that is an illustration which shows really the hopelessness of the contention which has been urged before us. I do not know and cannot imagine where it would land you. It cannot be said that because a supply of raw material is necessary for any business, therefore so much of the land as is necessary to produce, and does in fact produce or might produce, that raw material is free from undeveloped land duty.

On the first part of the case, therefore, it seems to me that the view taken by Atkin J. was perfectly well founded, that it is consistent with the views of Scrutton J. in *Inland Revenue Commissioners* v. *Duke of Devonshire* (1), which dealt with a dwelling-house and not with trade premises, and that really there is nothing in the form or the substance of the award of the referee which entitles the appellant to say on those findings that the award cannot stand.

Then it was further contended on behalf of the appellant that if he cannot claim all this land as free from undeveloped land duty on the ground of the erection of buildings, yet he can do so on the

(1) [1914] 2 K. B. 627.

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ground that the land is "used bona fide for business, trade, or industry other than agriculture." It is sufficient to say that it is not so used. I cannot see any reason for suggesting that it is. The surface of this land has never been broken. It is impossible, I think, to suggest that the use of these fields is so necessarily incidental to the use of the mill for the brickmaking apparatus that they can be in any way considered as part of the premises. The field coloured yellow has been used, and I assume—not that it is necessary to decide it—that the whole of the field has been used within the meaning of the Act. "User" is one thing, "building" is quite another. They stand entirely apart, and I think that neither on the ground of the buildings nor on the ground of the possible future user of this field if it remains in the same ownership can the present appellant succeed.

In my opinion the appeal fails, and must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. The question we have to determine in the present case is whether three plots of land coloured respectively red, green, and blue upon a plan which has been used in the course of the argument are properly assessable to undeveloped land duty. These plots of land were at the material period of time, and are now, occupied and used for agricultural purposes, including in those purposes nursery gardens. Prima facie, therefore, it would appear that they are rightly treated for the purposes of the Finance Act, 1910, as undeveloped land. But it is said that that prima facie view is not the right one, and for the reason that these plots of land contained brick-earth and were acquired some years ago, together with adjoining plots, by a man named Hills for the purpose of establishing upon the land so acquired a brick-making business, and further that he did, not on these lands, but on some of the adjoining lands, erect buildings for that purpose at a cost of some 36,000*l*. The referee has found as a fact that it would be necessary, in order to obtain a proper return for the capital expended in the erection of the buildings, to continue working the brickworks for thirty years, and that that continued working can only be obtained by having the brick-earth in these three plots in question as a reserve. Now those, I think, are the only material

facts. On that it is contended that the land in question ought to be treated as used for the purpose of the trade or business, or if it cannot be so treated, then it ought to be treated as developed by the erection of the buildings.

Now I come to the section on which the question turns. The first sub-section imposes a duty in respect of the site value of what the statute calls undeveloped land. The second sub-section provides that land is to "be deemed to be undeveloped land if it has not been developed by the erection of dwelling-houses or of buildings for the purposes of any business, trade, or industry other than agriculture (but including glasshouses or greenhouses), or is not otherwise used bona fide for any business, trade, or industry other than agriculture." Now I pause there for one moment. There are two ways in which land which would otherwise be treated as undeveloped land may become developed land –first, by the erection of buildings; secondly, by user bona fide for any business, trade, or industry other than agriculture. Has this land in question been developed in either of those two ways? I will first dispose of the second part of the question, which seems to me to be the easier. I think it is quite plain that this land is not, and never has been, used for the purpose of any trade or industry. It has been let out, occupied, and used for agricultural purposes, and therefore has not been developed by user. Now I do not think it is necessary to say in any general terms what land may be treated as used, but I must just make this remark: The Commissioners have hitherto treated the whole of the plot coloured yellow, on which the buildings are erected, as not subject to undeveloped land duty. Part of that plot, about five acres, is land in its natural condition, that is to say, not yet worked for brick-clay; and it is said that the land is properly treated as used for business purposes. I quite agree. I think it is not necessary, in order that the land may be treated as used for business purposes, that it should be, to take this particular case, actually worked for brick-earth at the moment. You must look at it from a business point of view; and if a plot of land may, from that point of view, be treated as used for the business, then it would not be undeveloped land. But that would not apply to the plots in question, which are actually at this moment being used for other purposes. That particular development will therefore not apply, in my opinion,

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to these particular pieces of land. Are these pieces of land, then, developed by the erection of buildings? There seems to me, on the words of this section, to be really no distinction between the development of land by the erection of dwelling-houses and the development of land by the erection of buildings for the purposes of any business, trade, or industry. It seems to me in both cases so much of the land is developed by the buildings as is included in the expression "buildings" when properly interpreted.

Now, with regard to dwelling-houses, that principle was applied by Scrutton J. in the *Duke of Devonshire's Case* (1), and the real point of that decision was that the word "dwelling-house" in this section is not to be taken to mean simply the bricks and mortar which constitute the dwelling-house, or even the bricks and mortar constituting the dwelling-house together with that which may be called the curtilage of the dwelling-house, but it is that which by practical people, referring to a house to be used as that house was to be used, and in the situation in which that house was situated, would be regarded as forming part of that dwelling-house.

Now it seems to me that exactly the same principles of interpretation must be applied to the expression "buildings for the purposes of any business." What is meant by and included in that expression properly interpreted? It seems to me that that expression, properly interpreted for this particular case, would include so much of the land adjoining the buildings as would be necessary to enable those buildings to be used as buildings; that is to say, it would include not merely the site of the actual buildings themselves but the land immediately surrounding them (the land which, I suppose, would be popularly referred to as the brickyard), but that it does not include that which may be regarded as necessary in order to the future profitable use of those buildings. That seems to me quite a different thing. That land becomes developed if at all by user, and not by the erection of the buildings.

In my opinion, therefore, this land is neither bona fide used for the purpose of trade or industry, nor is it developed by the erection

(1) [1914] 2 K. B. 627.

of the buildings. It is therefore quite properly treated by the referee as assessable to undeveloped land duty.

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SCRUTTON L.J. I agree.

Appeal dismissed.

Solicitors for appellant: *Hammond & Richards.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

G. A. S.

[IN THE COURT OF APPEAL.]

C. A. 1916 *Oct.* 13.

GRAHAM *v.* HART.

[1916 G. 1253.]

Bill of Sale—"Condition"—Registration—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 3.

The defendant agreed to lend the plaintiff 60*l.* upon the security of a bill of sale over her furniture. The defendant's representative thereupon took an inventory of the furniture, and asked the plaintiff for 30*s.*, stating that the matter could not go through unless the plaintiff paid him that amount. The plaintiff, in order to get the matter through, gave him a cheque for 30*s.*, it being arranged that the cheque should not be cashed until the advance had been made. The bill of sale was subsequently executed to secure the sum of 60*l.* and interest, and the 60*l.* was paid in cash to the plaintiff. The bill of sale contained no statement as to the payment of the 30*s.*:—

Held, that the payment of the 30*s.* was not a "condition" subject to which the bill of sale was made or given within the meaning of s. 10, sub-s. 3, of the Bills of Sale Act, 1878, and that therefore it was not necessary that it should be contained in the body thereof or written on the same paper or parchment therewith before registration; and that the bill of sale was not on that account void.

APPEAL from an order made by Sargant J. sitting in chambers as vacation judge refusing to continue an interim injunction until the trial of the action.

The action was brought in respect of a seizure of furniture and chattels at the plaintiff's residence under a bill of sale given by the plaintiff to the defendant and dated August 24, 1915, the writ in

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the action claiming (1.) an injunction restraining the defendant, his servants or agents, from selling or removing the goods and chattels comprised in the bill of sale, and from trespassing on the plaintiff's premises; (2.) damages for trespass; and (3.) a declaration that the bill of sale was invalid and an order for its cancellation.

The bill of sale stated that "in consideration of the sum of 60*l.* now paid in cash by the said mortgagee (the defendant) to the said mortgagor (the plaintiff) the receipt of which the said mortgagor hereby acknowledges she the said mortgagor doth hereby assign unto the said mortgagee his successors and assigns all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of 60*l.* and interest thereon at the rate of 60 per cent. per annum. And the said mortgagor doth further agree and declare that she will duly pay to the said mortgagee the principal sum aforesaid together with the interest then due by equal monthly payments of 5*l.* each on the 24th day in each and every month, the first payment to be made on the 24th day of September now next." Then followed covenants by the mortgagor to pay all rents, rates, taxes, and other outgoings payable in respect of any premises where the chattels might be, and to insure the chattels against loss or damage by fire, and concluded: "Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said mortgagee for any cause other than those specified in section 7 of the Bills of Sale Act (1878) Amendment Act, 1882."

Default having been made in payment, the defendant on August 28, 1916, took possession of the chattels comprised in the bill of sale. On the same day this action was brought claiming relief as above mentioned, and an interim injunction was granted ex parte restraining the defendant from removing and selling the chattels until the hearing of a summons returnable on September 5. A summons was thereupon taken out by the plaintiff on August 29 asking that the interim injunction should be continued until the trial of the action, and also for an injunction restraining the defendant from trespassing on her premises. The plaintiff made an affidavit in support of the summons in which she stated that on August 24, 1915, she owed 36*l.* on the security of a bill of sale. Paragraph 2 of the affidavit was as follows: "About a week before

the said 24th August, 1915, I received a letter from one Rosser offering to pay off the existing bill of sale and to lend me more money. The said Rosser eventually informed me and I believe that he was an agent of the defendant. I agreed to borrow 60*l.* from the defendant, but no terms were arranged. The defendant subsequently came and inspected my furniture and told me he would lend the money, and that an inventory must be taken." Paragraph 3: "Shortly after that one Stone (who represented himself to be and I believe was the defendant's manager) came and took an inventory. He asked me for 30*s.* and said the matter could not go through unless I paid him 30*s.* In order to get the matter through I gave him a cheque for 30*s.*, which was not to be cashed until the money had been advanced." Paragraph 4: "On the 24th August, 1915, I attended at the defendant's office with my husband. The defendant read over to me the bill of sale and then gave it to me to read. He then said 'You understand what you have to do; you have to pay one shilling in the pound interest per month on all moneys owing, and I have power to seize if the instalments are not kept up regularly.' After discussion I agreed to these terms and conditions." The bill of sale was signed and the 60*l.* was paid to the plaintiff. She further stated that the defendant had always charged her interest at 60 per cent. per annum on all moneys owing contrary, as she believed, to the terms of the bill of sale, and had rendered an account on that footing.

The summons came before Sargant J. at chambers on September 5, when the learned judge dismissed the application. The plaintiff appealed.

On September 6 Pickford L.J. made an order ex parte continuing the interim injunction until September 16, and by consent the injunction was continued until the hearing of the appeal.

Ritter, for the plaintiff. The bill of sale was made or given subject to a condition not written on the same paper or parchment and not registered, contrary to s. 10, sub-s. 3, of the Bills of Sale Act, 1878. (1) The payment of the 30*s.*, presumably for expenses, was a

(1) 41 & 42 Vict. c. 31, s. 10: "A bill of sale shall be attested and registered under this Act in the following manner:— . . . . . "(3.) If the bill of sale is made

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condition precedent to the coming into existence of the bill of sale. The bill of sale is therefore void as regards the personal chattels therein comprised.

Next, the bill of sale does not represent the true bargain between the parties. The bargain, as stated in the plaintiff's affidavit, was that the grantor should pay interest at the rate of 60 per cent. per annum upon all arrears of principal, whereas the bill of sale only makes her pay that interest down to the due date of each instalment. Therefore only interest at the rate of 5 per cent. per annum is payable after default: Reed on Bills of Sale, 13th ed., p. 323, note (*a*). The bill of sale is therefore void in respect of the personal chattels comprised therein: *Pettit* v. *Lodge* (1), per Fletcher Moulton L.J.; *Hall* v. *Whiteman*. (2) The fact that the bill of sale is more favourable to the grantor than the real bargain is immaterial. [*Goldstrom* v. *Tallerman* (3) was also referred to.]

J. B. Matthews, *K.C.*, and *F. Mellor*, for the defendant. The giving of the cheque for 30*s.* was not a "condition" subject to which the bill of sale was made or given within the meaning of s. 10, sub-s. 3, of the Bills of Sale Act, 1878. "Condition" in that subsection means a condition which varies in some way the estate or rights of the grantor or grantee under the bill of sale. The handing over of the cheque on the understanding deposed to by the plaintiff was quite unobjectionable because it was not to be cashed until after the bill of sale had been executed and the transaction completed. It did not in any way affect the rights of either

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or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void."

By s. 8 of the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), every bill of sale shall be registered, and shall truly set forth the consideration for which it was given, otherwise it will be void in respect of the personal chattels comprised therein.

(1) [1908] 1 K. B. 744, 749.
(2) (1911) 28 Times L. R. 161.
(3) (1886) 18 Q. B. D. 1.

party under the bill of sale. A defeasance or condition not contained in the bill of sale in order to render the bill of sale void must exist at the time the bill of sale is made or given; there must be some antecedent or contemporaneous agreement, part of the same transaction: *Lester* v. *Hickling*. (1) Scrutton J. in that case felt a difficulty as to whether in *Pettit* v. *Lodge* (2) the agreement which was there held to be a defeasance was made before or after the bill of sale was executed.

[*Ritter* (who was one of the counsel in that case). The agreement there was contemporaneous with the giving of the bill of sale.]

That removes the difficulty felt by Scrutton J. Next, the bill of sale is in accordance with the statement in the affidavit. The defendant is entitled under the bill of sale to charge interest at the rate of 60 per cent. per annum on all principal in arrear. If, however, that contention is wrong, the defendant has merely made a mistake in his charges which can be rectified when the accounts are taken. It does not affect his right to seize. [*Edwards* v. *Marcus* (3) and *Rosefield* v. *Provincial Union Bank* (4) were referred to.]

Ritter in reply.

SWINFEN EADY L.J. This is an appeal from an order of Sargant J. at chambers refusing to continue an injunction which had been granted ex parte on the issue of the writ. The plaintiff seeks to restrain the defendant, who has taken possession of certain chattels in her dwelling-house under a bill of sale, of which she is the grantor, from remaining in possession or removing the chattels, upon the ground that the bill of sale is invalid. The defendant justifies the seizure under the bill of sale.

The bill of sale is said to be invalid upon two grounds. The first ground is that the transaction as to the 30*s.* comes within s. 10, sub-s. 3, of the Bills of Sale Act, 1878—in other words, that the bill of sale was made or given subject to a condition not contained in the body thereof, nor written on the same paper or parchment before registration, and is therefore invalid. [The Lord Justice read paragraphs 2 and 3 of the plaintiff's affidavit.] The 30*s.* was

(1) [1916] 2 K. B. 302, 305.
(2) [1908] 1 K. B. 744.
(3) [1894] 1 Q. B. 587.
(4) [1910] 2 K. B. 781.

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Swinfen Eady L.J.

to be paid, apparently, for the expense of making the inventory. The plaintiff when she drew the cheque for the 30*s.* stipulated that it should not be cashed until after the money had been advanced. So far as appears from the affidavit there was no bargain that the 30*s.* was to be paid out of the money advanced, or that any part of the advance was to be applied in meeting the cheque. The affidavit only says that the cheque was not to be cashed until the money had been advanced.

Is that a "condition" within the meaning of s. 10, sub-s. 3? In my opinion this transaction was not a condition affecting the bill of sale in any way. The condition was merely that the defendant was not to cash the cheque until the money had been advanced, but the bill of sale was not given subject to that condition. The cheque had been given and the inventory made before the bill of sale was executed. It was not as if there was any bargain affecting the rights of the grantor or grantee under the bill of sale, or affecting the terms upon which the chattels comprised in the bill of sale were to be redeemable, or affecting the right of entry of the mortgagee. It had nothing to do with the security. The whole sum of 60*l.* was paid in cash to the plaintiff under such circumstances that she could do what she liked with it. There was no bargain that she was to meet the cheque out of the 60*l.* The defendant merely trusted that after the advance had been made the cheque on presentation would be met. In *Pettit* v. *Lodge* (1) the part of the bargain which was not registered did affect the exercise by the parties of their rights under the bill of sale. In the present case the arrangement as to giving the cheque and not presenting it did not affect the security in any way, and the bill of sale was not made or given subject to a condition. This point therefore fails.

The second point upon which the plaintiff relies is of a different character. It is said that the bill of sale is invalid because it does not truly set out the bargain between the parties. The contention is that on the true construction of the bill of sale interest at the rate of 60 per cent. per annum is only payable down to the dates named for the payment of the respective instalments of principal, and that thereafter there is only a right to such interest as the law allows; and that, if that is so, the bill of sale does not carry out the bargain

(1) [1908] 1 K. B. 744.

between the parties as set out in paragraph 4 of the plaintiff's affidavit. Now paragraph 4 does not purport to set out the negotiations for the contract or the terms of a concluded bargain to be subsequently embodied in the instrument. It merely states that after the bargain had been made and the bill of sale prepared the bill of sale was read over to the plaintiff, and that then a statement was made by the defendant as to its contents. It does not state the period for which 60 per cent. interest is to be paid "on all moneys owing." Whether the period is only until the instalments of principal fall due, or whether it is on all principal moneys from time to time remaining unpaid, is not stated. The statement is consistent with either view. It will be for the judge at the trial to determine the true construction of the bill of sale. If there had been any misstatement as to the nature and contents of the instrument which the plaintiff was then being asked to sign, although it might have afforded a ground for setting aside the instrument, it would not give rise to an action in the present form. She has not offered to return the money. The claim is based upon a contention that the bill of sale is itself illegal as not carrying out the true bargain between the parties. Upon the evidence the plaintiff has failed to make out that point. The plaintiff has failed to make out any prima facie case for the continuance of the injunction, and the order of Sargant J. must be affirmed.

LAWRENCE J. I am of the same opinion and have nothing to add.

Appeal dismissed.

Solicitor for plaintiff: *J. K. Torkington.*
Solicitor for defendant: *Isadore Goldman.*

W. F. B.

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May 16, 17;
June 3.

[IN THE COURT OF APPEAL.]

WILSON & CO., LIMITED *v.* TENNANTS (LANCASHIRE), LIMITED.

[LIVERPOOL DISTRICT REGISTRY.]

[1915 W. 733.]

Contract — Condition — Suspension of Delivery — Contingency — "Preventing or hindering delivery" — War — Shortage of Supply — Rise in Price — Physical or Legal Prevention — Economic Unprofitableness.

In 1914 the defendants were under contract with the plaintiffs to supply them with a specified quantity of magnesium chloride during that year at 63*s.* per ton. When 240 tons were still undelivered war broke out with Germany, stopping all supplies from that country and occasioning a shortage of supply in England, with a consequent rise in price. Within a few days from the outbreak of war on August 4, 1914, the price had risen 10*s.* per ton, and the defendants suspended deliveries under a condition in the contract which provided that deliveries might be "suspended pending any contingencies beyond the control of the sellers or buyers (such as . . . . war . . . .) causing a short supply of labour, fuel, raw material or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article."

At no time was the shortage of supply caused by the war such that it was an impossibility for the defendants to procure sufficient to perform their contract if they had been willing to pay the enhanced price. In an action by the plaintiffs for damages for breach of the contract:—

Held by the Court of Appeal (Lord Cozens-Hardy M.R. and Pickford L.J., Neville J. dissenting), that, on the construction of the condition, "preventing or hindering the manufacture or delivery of the article" qualified the whole condition, and a mere shortage of supply caused by war, which did not also prevent or hinder delivery, did not entitle the defendants to suspend delivery; that "preventing or hindering" referred to a physical or legal prevention and not to an economic unprofitableness arising from a rise in price; and that the defendants were not entitled to the protection of the condition.

Decision of Low J. reversed.

Per Neville J. (dissenting), that "preventing or hindering" were not in ordinary usage confined in meaning to a physical impossibility or a physical obstruction; that the contracting parties had in contemplation the contingency of war and the consequent shortage of supply and rise in price; and that, whichever

way the condition were construed, the war caused a shortage of supply and a substantial rise in price which prevented or hindered delivery and entitled the defendants to take advantage of the condition.

APPEAL from a decision of Low J., sitting at Liverpool without a jury, dismissing the plaintiffs' action against the defendants for damages for breach of a contract dated December 12, 1913, for the sale and delivery by the defendants to the plaintiffs at the price of 63*s.* per ton of their requirements of magnesium chloride over 1914, estimated at from 400 to 600 tons, packed in iron drums four to six cwts. each, the quantity to be at the buyers' option, the minimum quantity of German to be fifty tons.

The conditions annexed to the contract provided as follows :—

Condition 1 : "Deliveries may be suspended pending any contingencies beyond the control of the sellers or buyers (such as fire, accident, war, strikes, lockouts, or the like) causing a short supply of labour, fuel, raw material or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article."

Condition 2 : "Any deliveries so suspended shall be taken by the buyer at the same rate of delivery as above specified, commencing after the period assigned to this contract."

Condition 6 provided that any disputes on the contract should be settled by arbitration in Liverpool.

The alleged breach of contract was the suspension of delivery by the defendants, who claimed to suspend deliveries under condition 1 owing to a shortage in the supply of magnesium chloride consequent upon the outbreak of war with Germany on August 4, 1914.

The further material facts are as follows :—Previously to the outbreak of the war the main sources of supply in this country of magnesium chloride had been 5000 tons manufactured by the United Alkali Company, who were limited to that yearly amount under an agreement with a German combine called the Stassfurt Convention of Germany, and a further 7500 tons manufactured in Germany. In 1914, up to the month of August, the quantities supplied from these sources had been 2132 and 3907 tons respectively.

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At that time the United Alkali Company were under contract with the defendants and Messrs. Schneider & Co. to supply to them jointly the whole of their production of magnesium chloride for 1914 at a price of 48*s.* per ton if in iron drums of five to six cwts. each, subject to certain conditions which comprised conditions in terms precisely similar to those above set out, the form of contract used by the United Alkali Company having been in fact adopted by the plaintiffs and defendants in their contract of December 12, 1913. Any further supply required by the defendants had to be obtained from the German combine. On the outbreak of the war this latter source of supply ceased, the United Alkali Company were left with a practical monopoly of the supply in this country, and the price of magnesium chloride naturally rose very rapidly. The plaintiffs were then still entitled to a delivery of 250 tons from the defendants under their contract of December 12, 1913, and shortly afterwards they wrote to the defendants requesting delivery of ten tons.

On August 12, 1914, the United Alkali Company claimed to cancel their contract with the defendants and Messrs. Schneider & Co. on the alleged ground that they were the agents of an alien enemy, and on August 15 the defendants wrote to the plaintiffs informing them of the fact and saying that they had no option but to cancel their contract of December 12, 1913, with the plaintiffs, adding that the United Alkali Company (whom the defendants called their "principals"), having advanced their price by 10*s.* a ton, had instructed the defendants to do the same, and that they would carry out the order for ten tons at that price. The plaintiffs accepted under protest and received delivery of the ten tons. On October 19, 1914, the defendants wrote to the plaintiffs explaining that by their previous letter they meant that they were entitled to suspend delivery under condition 1. The matter was referred to arbitration under condition 6, and on November 30, 1914, the arbitrators made the following award:—"That sellers could not plead cancelment nor could they invoice against the contract at any different price from that stipulated therein, viz. 63*s.*, and that the ten tons invoiced at 73*s.* be reduced to 63*s.*; and we further award:—that there are now outstanding under the contract 240 tons magnesium chloride for delivery in about equal monthly quantities as stated therein

which deliveries are to be suspended in accordance with clause 1 of the conditions of sale."

In September, 1914, the defendants informed the plaintiffs that the United Alkali Company had again advanced the price a further 20*s.* per ton. By a contract dated December 13, 1914, between the United Alkali Company and the defendants, the latter were appointed the sole agents for the company in Great Britain and Ireland for the year 1915, and the defendants engaged to take 7000 tons of magnesium chloride in that year in equal monthly quantities at 4*l.* 17*s.* 6*d.* per ton. On January 27, 1915, the defendants offered to supply magnesium chloride to the plaintiffs for the year 1915 at 5*l.* 10*s.* per ton, but they declined to deliver the balance due under the contract of December 12, 1913, at the contract price and claimed to continue to suspend deliveries under condition 1.

On April 17, 1915, the plaintiffs issued the writ in this action. They claimed some 1500*l.* damages in respect of (1.) increased cost of purchasing eighty-five tons of magnesium chloride on the market, (2.) loss of estimated profits through inability to obtain delivery of the balance, and (3.) claims paid in respect of contracts they could not fulfil. Alternatively they claimed that if, contrary to their contention, the defendants rightfully suspended delivery during the remainder of the period of the contract, namely, December 31, 1914, they were entitled to delivery of the 240 tons at the same rate of delivery on and after January 1, 1915. They therefore claimed 1764*l.* damages in respect of the defendants' failure to meet such delivery, and their own estimated loss of profit.

By their defence the defendants contended that the award of the arbitrators was binding on the plaintiffs and estopped them from alleging that the defendants were not entitled to suspend delivery under condition 1, and, alternatively, that if the award was not binding the claim in this action should be referred to arbitration, and that the defendants were entitled to suspend delivery under condition 1 inasmuch as a contingency—war—had arisen preventing or hindering the manufacture or delivery of magnesium chloride. With regard to the plaintiffs' alternative claim they contended that this was a matter which ought to be referred to arbitration under condition 6, and, further, that the contingency entitling them to suspend delivery was still pending, that no right to delivery under

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condition 2 had yet arisen, and that the period assigned to the contract had not yet ceased.

Evidence was given before Low J. of the increase in the prices at which the defendants could obtain chloride of magnesium and that there was right down to the issue of the writ a continued shortage in the general supply of magnesium chloride in the United Kingdom. The effect of this evidence is more fully stated in the judgment of Pickford L.J.

Low J. dismissed the action, holding that the defendants were justified in suspending delivery under condition 1 and that the right to the suspended delivery had not yet arisen.

The plaintiffs appealed.

Rigby Swift, K.C., and *A. R. Kennedy*, for the appellants. The contract was not put an end to by the war. The defendants could always have delivered the goods to us. A general shortage was not enough; there must have been a shortage which affected this contract to justify them in suspending payment under condition 1. No right to suspend under that condition has arisen. If it has, then condition 2 applies. The rise of price resulting from the war must have affected this contract to make it a ground for repudiation: *Greenway Brothers* v. *Jones & Co.* (1) The mere rise of price cannot excuse the defendants from delivery: *Instone & Co.* v. *Speeding, Marshall & Co.* (2); *Bolckow, Vaughan & Co.* v. *Compania Minera de Sierra Minera.* (3) The defendants do not show actual shortage of magnesium chloride preventing them from delivering; they only show that there was a general shortage in the country. The existing shortage did not hinder delivery in a commercial sense. The defendants could have obtained sufficient of the magnesium chloride to supply the plaintiffs under the contract, though at an enhanced price, and the defendants actually offered it to the plaintiffs at the enhanced price. There was no physical difficulty preventing or hindering the defendants from fulfilling the contract if they had paid the enhanced price. A rise in price may be evidence of a shortage of supply, but of itself is not sufficient to exonerate plaintiffs. The onus is on them to prove actual short supply. The

(1) (1915) 32 Times L. R. 184. (2) (1915) 32 Times L. R. 202.
(3) (1916) 32 Times L. R. 404.

rise in price was largely due to the fact that the United Alkali Company had become monopolists and had put up the price. The defendants ought to have compelled the United Alkali Company to deliver to them under their contract with them. The defendants do not show that they could not have met the plaintiffs' demands, but rely on the rise in price as a reason for non-delivery, and that will not do.

Greer, K.C., and *A. H. Maxwell*, for the respondents. It seldom happens but that by paying an enhanced price you can get an article. This clause was put in to protect the seller. The object of the clause is that the seller takes the risks of normal but not of abnormal fluctuations. Supply in condition 1 cannot mean supply on the merchant's premises, but supply that he can get by purchase in this country. Shortage of raw material is shortage in somebody else than the seller. There was such a shortage in the country due to the war as would put up the price. There was a shortage of 50 per cent., and the demand in the country was not less. Germany, in fact, was cut off from trading, and England and her allies and the United States and many foreign countries had to get their supplies of magnesium chloride from this country. There is clear evidence of shortage of supply and of no diminution of demand. The defendants could not force the United Alkali Company to go on with their contract with them. The war put an end to their contract with that company and prevented them from getting supplies from Germany. The defendants could not fulfil all their contracts as there was not enough magnesium chloride to go round.

On the true construction of the contract "otherwise preventing or hindering" does not relate back to the contingency of war. A shortage of supply caused by war is enough. But even if those words do qualify what has gone before, then the enhanced price was a "hindrance." It may not have been a "prevention," but it amounted to a "hindrance." "Hindrance" means "interference with," and is satisfied with something less than prevention. Hindrance is not a physical hindrance only: *Crawford* v. *Wilson, Sons & Co.* (1) A shortage which makes supply more difficult is a hindrance. There was an actual shortage, and also a hindrance due to price, which is one of the main considerations in the case

(1) (1895) 1 Com. Cas. 154, 277.

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of a contract between merchant and customer. Further the plaintiffs are estopped by the award from recovering in this action.

[LORD COZENS-HARDY M.R. We understand that the parties desire to have the contract construed, and we can decide the question of construction quite apart from any question arising out of the award.]

Then we reserve our argument upon that point.

Rigby Swift, K.C., in reply. The contract in this case is in form the same as that used by the United Alkali Company and their customers who were merchants, and is not appropriate to a contract between those merchants and their customers. As used by the United Alkali Company the words no doubt mean preventing or hindering manufacture. These words do not affect the merchant and his customer. There is no case in which price has been treated as a hindrance. The defendants say that price is the only thing which could be a hindrance to a merchant, but you cannot read "price" into this contract.

Cur. adv. vult.

June 3. LORD COZENS-HARDY M.R. I have read the judgment about to be delivered by Pickford L.J. and I agree with it.

PICKFORD L.J. In this case the plaintiffs claim damages from the defendants for breach of a contract for the sale of magnesium chloride by the defendants to the plaintiffs, and the question to be decided is whether the defendants, in the events that have happened, are excused from delivery under the contract. It is not denied that, unless they are protected by the condition to which I shall refer later, there has been a breach of the contract and the defendants are liable.

The contract bears date December 12, 1913, and is for the sale by the defendants to the plaintiffs of their requirements of magnesium chloride over 1914, estimated at from 400 to 500 tons, packed in iron drums four to six cwts. each. The price was to be 63*s.* per ton delivered to the plaintiffs' works, the minimum quantity of German to be fifty tons.

This contract was subject to certain conditions of sale, the first and second and only important ones of which are as follows: [His

Lordship read those conditions and continued :] Up to the time of the outbreak of war the main source of supply in 1913 had been 5000 tons manufactured by the United Alkali Company, who were limited as to the amount they could sell by an agreement with a German combine, and about 7500 tons manufactured in Germany. In 1914, up to August, the quantities had been 2132 and 3907 tons.

There were certain contracts of the defendants which were cancelled on the outbreak of war, but I do not think it necessary to examine them in detail. The result of the war was that the supply from Germany ceased, there was a shortage of magnesium chloride, the United Alkali Company were left with a practical monopoly of the supply, and prices naturally rose very rapidly.

On August 15, 1914, the defendants wrote to the plaintiffs that their principals, by which they meant the United Alkali Company, had cancelled their contract with them and that they had no option but to cancel their contract with the plaintiffs. By this they explained later that they meant suspend deliveries under condition 1. They also informed the plaintiffs that the works, again meaning the United Alkali Company, had advanced their price by 10*s.* a ton, and had instructed them to do the same and not to accept any orders without first submitting them to the United Alkali Company. They also said that they would submit an order which they had for the plaintiffs to their principals, meaning the United Alkali Company, but in any event it would only be supplied at 10*s.* per ton advance.

There was a close connection between the defendants and the United Alkali Company, the nature of which I do not quite understand, but the case must be dealt with on the footing that the defendants were principals in the sale to the plaintiffs although they speak of the United Alkali Company as their principals. It is to be noted that even if the defendants had to pay 10*s.* a ton more to the United Alkali Company the price would still be 5*s.* a ton below that at which they had sold to the plaintiffs. The plaintiffs took delivery of some small lots at the advanced price, but this was afterwards repaid to them under an award, on the ground that the defendants had delivered these lots under the contract and therefore could only charge the contract price.

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On September 4, 1914, the defendants informed the plaintiffs that the works, i.e., the United Alkali Company, had again advanced the price a further 20*s.* per ton, and the price continued to rise until a date which was treated as a critical date, December 13, 1914, when a contract was made between the defendants and the United Alkali Company by which the defendants were appointed the sole agents for the United Alkali Company in Great Britain and Ireland for the year 1915, and engaged to take 7000 tons of magnesium chloride in the year, in equal monthly quantities, at a price of 4*l.* 17*s.* 6*d.* per ton. The price had risen by reason of there being a shortage of the article, and also, no doubt, because the United Alkali Company had a practical monopoly and could put the price up as they liked. They could not, however, have done this but for the removal of the German competition. On January 27, 1915, the defendants offered to supply magnesium chloride to the plaintiffs over the year 1915 at 5*l.* 10*s.* per ton, but they declined to deliver the balance due under the contract at the contract price and claimed to continue to suspend deliveries under condition 1.

The question is whether under these circumstances condition 1 applies. I think it is clearly shown that the price very soon rose to such an extent that the defendants could not carry out the contract except at a loss, and that such rise was occasioned by a shortage of magnesium chloride by reason of the war, but I do not think it is shown that the defendants could not obtain sufficient to supply the plaintiffs. They had other contracts running, but they had made arrangements as to those contractors, and Mr. Winsloe, the defendants' managing director, said, "At a price we might always have carried out this contract with the plaintiffs."

The first thing is to see how the words of the condition should be read. It was contended before us that the words "preventing or hindering the manufacture or delivery of the article" were only to be read with "otherwise" and not with the preceding words, i.e., that the defendants were entitled to suspend deliveries if war caused a shortage—by which it was said a substantial shortage must be meant—even though that shortage did not prevent or hinder the manufacture or delivery of the article. I do not think that is the true way to read the condition. I think "preventing or hindering" qualifies the whole clause, and that a short supply of raw material,

&c., which did not prevent or hinder the manufacture or delivery would not excuse the defendants.

The question then to be decided is, Did this large rise in price, the effect of shortage produced by war, prevent or hinder the manufacture or delivery of the article? The case is not made any easier to decide by the parties having chosen to contract on the United Alkali Company's form. That company are both manufacturers and merchants, but chiefly manufacturers, and this contract is drawn chiefly from a manufacturer's point of view, whereas the defendants are merchants, and it was argued that rise of price was the only hindrance they could have thought about, and therefore the word must be interpreted differently from the same word in a manufacturer's contract. I think that the words must be read so as to give them a natural and proper meaning in the circumstances under consideration, but they cannot be interpreted in a non-natural sense because the merchant has chosen to use a form of contract not completely applicable to his case.

We were referred to certain recent cases on the subject, one before Shearman J.—*Greenway Brothers* v. *Jones & Co.* (1)—and two before Bailhache J.—*Instone & Co.* v. *Speeding, Marshall & Co.* (2) and *Bolckow, Vaughan & Co.* v. *Compania Minera de Sierra Minera* (3)—in which a similar contention has been discussed, and I have had the advantage of seeing the judgments of Scrutton J. in two cases—*Scheepvaart Maatschappij Gylsen* v. *North African Coaling Co.* (4) and *Blythe & Co.* v. *Richards, Turpin & Co.* (5) It is not, however, possible, in my opinion, to lay down any general rule as to the effect of a large increase of prices upon clauses of this kind, as it must depend in every case upon the terms of the clause and the words used. For instance, it is evident that words like "interfering with or affecting the performance of the contract" may have quite different and wider meanings than "preventing or hindering the manufacture or delivery of the article."

The word "preventing" is not uncommon in exception clauses—the word "hindering" is not so common in fact; we were not referred to any case in which "hindering" has been used,

(1) 32 Times L. R. 184.
(2) 32 Times L. R. 202.
(3) 32 Times L. R. 404.
(4) (1916) 114 L. T. 755.
(5) (1916) 114 L. T. 753.

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though "hindrance" is used in the case of *Crawford* v. *Wilson, Sons & Co.* (1)

I think I am correct in saying that a rise of price, even if very large, has never been held to come within such words as "preventing delivery," and I agree with what is said by Scrutton J. in *Blythe & Co.* v. *Richards, Turpin & Co.* (2), that prevention in a clause of this sort is a physical or legal prevention and not an economic unprofitableness. I also think in this clause "hindering" must refer to an interference with manufacture or delivery from the same causes as "prevention," but interference of a less degree, and thus economic unprofitableness does not hinder either manufacture or delivery within the meaning of this condition.

I do not agree with the contention that the merchant cannot be hindered in any other way; he might by reason of the shortage not be able to get the article, in which case he would be prevented from delivery, or he might only be able to get it in small quantities and slowly, and there might be a short supply of labour or fuel caused by the war which would hinder his delivery. I think, therefore, that the defendants were not protected by this condition. The difficulty of applying it in their favour is shown by what took place in this case. They claimed to take advantage of it when the price to them had only gone up 10*s.* and was still below the price at which they had sold, and it would be extremely difficult to say when the rise became sufficiently great to hinder delivery and what was the exact amount of loss, if any, to which the defendants must submit before they were hindered from delivery. It was argued that they were at any rate hindered when delivery became commercially impossible. I should think that if that were a correct contention commercial impossibility would prevent delivery and that commercial inconvenience would hinder it; but that seems to me quite an unnatural use of the words "hinder delivery" and would seem to lead to this, that whenever the transaction showed a loss, or even an insufficient profit, there would be a commercial inconvenience and therefore a hindering.

I do not, therefore, think this contention is sound, and I am not satisfied that there has been commercial impossibility unless that may be translated as meaning a heavy loss. The price to the

(1) 1 Com. Cas. 154, 277. (2) 114 L. T. 753.

defendants rose from 48*s.* to 97*s.* 6*d.*, or a little more than double. The price to the plaintiffs was 63*s.* There was therefore a loss, taking the price alone, of 34*s.* 6*d.* The plaintiffs claim that 240 tons were undelivered, and there would be some further loss probable in respect of cost of delivery, but the whole does not seem to me to amount to a loss which constitutes commercial impossibility. The defendants could of course have fulfilled their contract at a much less loss than this if they had done so at the proper dates, because the prices did not for some time reach the amount attained in December, 1914.

In the view that I take it is not necessary to consider the plaintiffs' contention on condition 2. The defendants also contended that this point had been decided against the plaintiffs by an award of arbitrators, and that they were therefore prevented from raising it in this action. I think there is nothing in this point. The award is so vague and uncertain that it cannot be said to decide anything and is bad on the face of it.

NEVILLE J. I have arrived at a conclusion upon this contract different from that of the other members of the Court. The much greater experience of Pickford L.J. in commercial contracts, and the fact that the Master of the Rolls shares his conclusion, make me extremely diffident of my own opinion. I think, however, I ought to indicate how the contract strikes me.

By an agreement dated December 12, 1913, the defendants agreed with the plaintiffs to supply them with chloride of magnesium over the year 1914 in certain quantities and at certain prices. By condition 1 to the agreement it was provided that deliveries might be suspended pending certain contingencies (of which war was one) causing a short supply of, amongst other things, manufactured produce (which must, I think, be taken to include chloride of magnesium) or otherwise preventing or hindering the manufacture or delivery of the article. The sentence may, I think, be read "Deliveries may be suspended if and so long as war causes a short supply of chloride of magnesium or in some other way prevents or hinders the delivery of the article." I think that sentence imports the meaning that a short supply would prevent or hinder the delivery of the article, and I see no reason here for attributing

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to it any meaning other than the grammatical one. Now there is no question in this case but that the war did cause a short supply. The only English firm which produced magnesium chloride in important quantities was restricted by agreement with a German combination to a limited output much less than half of what was required for the English demand; all the rest was to be supplied by Germany. After the declaration of war the imports from Germany rapidly declined and ultimately ceased altogether, while the English firm, although released from the dictation of their German associates, had not the plant nor the facilities to overtake immediately the English demand. If short supply alone, therefore, was enough to justify suspension of delivery the defendants were right.

But if I am wrong in construing the agreement in the sense above mentioned, and it has also to be shown that short supply did prevent or hinder, I arrive at the same conclusion. There is no evidence of any technical meaning attaching to the words "prevent or hinder" or either of them, nor do I think that any special meaning has been attached to either of these words by judicial decision. I have consulted the Oxford Dictionary, and I find that the primary meaning of the word hinder is to do harm to or damage, so that hindering delivery may very well mean causing damage in delivery. What perhaps is more to the point is that in the modern use of the word it is not used once in a dozen times in the sense of physica obstruction. It appears that hinder may mean prevent and prevent may mean hinder, but I think to-day we use prevent in a sense more absolute than hinder. We say we are prevented from getting things we want by their cost, prevented from accepting an invitation by a previous engagement, prevented from doing certain acts by self-respect. We speak of being hindered in our work by noise, of a man's career being hindered by his appearance or manners or some personal quality; in fact the idea of physical obstruction rendering a thing impossible seldom enters into our meaning when we say we are prevented or hindered. It appears to me, therefore, that there is no reason to confine the meaning of preventing or hindering to a physical impossibility or physical obstruction.

Now let me consider the circumstances in which the words are found. Innumerable contracts for future delivery were doubtless running at the outbreak of war which were silent on the question

of war. Unfortunately the English people considered war to be such a remote contingency as not to be worth taking into consideration in transacting the ordinary business of life. Here we have a case where the contingency was foreseen and a condition inserted in the contract for the protection of the seller if it should happen pending the running of the contract. The parties had before their eyes not only the possibility of war, but the practical certainty of a short supply of the article dealt in as the result of the war. They have used words large enough in their intention as, I think, to cover damage to the seller by rise of price. It was a hundred times more likely that a short supply would tend to a rise in price than that it would make it impossible to get chloride of magnesium if the seller put no limit on the price he would give for it. Ought the Court to put such a limited interpretation upon the words used as to make them exclude the very thing which must have been present to the mind of the seller when he was endeavouring to protect himself against the risk of war? Did he really, when he used these words, intend to take the whole risk of the perfectly inevitable rise of prices in the case of war? Do the words used show that this was the intention of the parties when they contracted in the terms of condition 1? I cannot think it. I confess that the addition of the words commercially or economically preventing or hindering which have been used in some cases do not assist me, because, unless they are limited to insolvency, I cannot form any definite idea in my mind of what they mean. The parties could not, I think, have intended preventing or hindering to refer to price but to be limited to cases where the price resulted in the seller's insolvency, because in that case the condition would have given no higher protection than the law of bankruptcy.

In my opinion the meaning of the parties expressed in condition 1, in whichever of the two ways I have referred to it is read, was to entitle the sellers to suspend delivery pending a war where it caused a short supply of the article and a substantial rise in price. It is true "substantial" is in itself indefinite, but, like "reasonable," it is a word which judges and juries have long had to deal with as best they may.

One is always apprehensive that the conclusion one comes to on a commercial contract may be quite at variance with the view

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taken by the average commercial man. It is some consolation to know that three independent commercial gentlemen to whom the contract was submitted came to a similar conclusion to that which I have expressed. With regard to the award, in the view I take it becomes immaterial, but it could not in any case, in my opinion, help the plaintiffs. The only material point decided by the arbitrators was the construction of the contract. What that construction was appears, I think, upon the face of the award, and if it was a wrong construction it is not, I think, binding upon the plaintiffs in a Court of law.

In my opinion the judgment of Low J. was right.

Appeal allowed.

Solicitors for plaintiffs: *Pritchard, Englefield & Co., for Simpson, North, Harley & Co., Liverpool.*

Solicitors for defendants: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

R. M.

1916

Oct. 24, 25, 26, 27; *Nov.* 17.

[IN THE COURT OF APPEAL.]

SCOTTISH NAVIGATION COMPANY, LIMITED *v.* W. A. SOUTER & CO.

[1914 S. 3254.]

ADMIRAL SHIPPING COMPANY, LIMITED *v.* WEIDNER, HOPKINS & CO.

Shipping—Charterparty—"Baltic Round"—Ship detained in Baltic Port—Frustration of Commercial Adventure—Restraint of Princes—Provision for Cessation of Hire—Cancellation Clause.

In the first case the plaintiffs by a charterparty, headed "Time Charter," let their steamship *Dunolly* to the defendants for "one Baltic round" at a certain rate of hire per month until redelivery (unless lost) to the plaintiffs at a coal port in the United Kingdom. Arrests and restraints of princes were mutually excepted. No voyage was to be undertaken that would involve risk of seizure or capture, and in the event of Great Britain or other European Power being involved in war affecting the working of the steamer

at the commencement or during the currency of the charter the defendants had the option of cancelling the charter or insuring the steamer against all war risks for full value. The *Dunolly* came on hire on July 4, 1914, and the first month's hire was paid; she was sub-chartered by the defendants, and she proceeded to the Baltic and was loading a cargo for the sub-charterers at a port in Finland when war broke out between Russia and Germany on August 1 and between Great Britain and Germany on August 4. After August 1, in consequence of orders of the Russian authorities, the *Dunolly* was not allowed to leave the Gulf of Finland and she was still there. She was quite uninsurable against war risks. On August 5, by which date the *Dunolly* was partly loaded and the master had given bills of lading which were held by the sub-charterers, the defendants purported to cancel the charter, reserving certain claims. The plaintiffs brought an action on November 6, 1914, to recover the hire of the vessel to November 4, 1914.

In the second case the charterparty was in the same form, and the facts were for all material purposes similar to those in the first case, except that the steamship *Auldmuir* was chartered for "two Baltic rounds," and no notice of cancellation was given. A claim by the shipowners to recover the hire of the vessel after her detention by the Russian authorities was referred to arbitration, and the arbitrators found in effect that there had been a frustration of the commercial adventure:—

Held, that both parties to the contract contemplated a commercial adventure, namely, a Baltic round; that the enforced delay was of such indefinite duration as completely to frustrate the commercial adventure; and that the contract was consequently determined, and the shipowners were not entitled to the hire claimed.

Held, also, that the cancellation clause did not apply in the events which had happened.

Judgments of Sankey J. [1916] 1 K. B. 675 and of Bailhache J. [1916] 1 K. B. 429 reversed.

THESE two appeals were heard together.

SCOTTISH NAVIGATION COMPANY, LIMITED *v.* W. A. SOUTER & CO.

Appeal from the judgment of Sankey J. at the trial of the action without a jury; reported [1916] 1 K. B. 675.

The action was brought to recover 3412*l.* 10*s.* for hire of the plaintiffs' steamship *Dunolly* to November 4, 1914, under a charterparty dated June 30, 1914. The defendants alleged that no hire was due because of the frustration of the adventure, or alternatively because they gave notice, as they were entitled to do,

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to cancel the charterparty; and further that in any event no hire was due after August 31, when the owners removed their crew from the vessel.

By the charterparty, which was headed "Time Charter" and was on a printed form, the plaintiffs (therein called "the owners") agreed to let and the defendants (therein called the "charterers") agreed to hire the steamship *Dunolly* "for one Baltic round," commencing from the day she was placed at the disposal of the charterers at an East Coast coal port, she being then in every way fitted for the service and being maintained by the owners with a full complement of officers, seamen, engineers, and firemen necessary for a steamer of her tonnage and class, "to be employed in such lawful trades between such safe ports of the United Kingdom and the Continent of Europe and/or Baltic as charterers or their agents should direct." The steamer was not to sail from a Baltic loading port between October 1 and April 1 unless the charterers paid any extra insurance incurred not exceeding 1*l.* 1*s.* per cent. The owners were to provide and pay for all provisions and wages of the captain, officers, engineers, firemen, and crew, and the insurance on the vessel (if any), and to provide and pay for the necessary equipment for the proper and efficient working of the steamer; the charterers to provide and pay for all the coals and fuel for the steam engines. "The charterers shall pay for the use and hire of the said vessel at the rate of 975*l.* per calendar month, commencing on and from delivery, as before stated, and at and after the same rate for any part of a month used to complete a voyage, until redelivery of the steamer (unless lost) to owners in the same good order and condition as when accepted (fair wear and tear excepted) at a coal port in the United Kingdom." The payment of hire was to be made half-monthly in advance in Glasgow, and "failing the punctual and regular payment of the hire, or any breach of the charterparty, as herein specified, the owners shall be at liberty to withdraw the vessel from the services of the charterers, without prejudice to any claim they (the owners) may otherwise have on the charterers, in pursuance of this charter." The captain, although appointed by the owners, was to follow the instructions of the charterers, who would furnish him from time to time with the necessary sailing directions.

The charterparty also provided "that in the event of loss of time from deficiency of men or stores, breakdown of machinery, or damage preventing the working of the vessel for more than twenty-four running hours, the payment of hire shall cease until she be again in an efficient state to resume her services, ... but should the vessel be driven into port, or to an anchorage by stress of weather or from any accident to the cargo, such detention or loss of time shall be at the charterers' expense; should steamer be detained by ice or quarantine same to be for charterers' account and time to count."

There was an exception clause which (so far as material) was as follows: "enemies . . . . arrests and restraints of princes, rulers and people . . . . always mutually excepted"; and "should the vessel be lost, the hire is to cease and determine on the day of her loss, and any hire paid in advance and not earned shall be returned to the charterers." It also contained the provision, "No goods, contraband of war, to be shipped, and the steamer not to be required to enter any port that is in a state of blockade, or where hostilities are in progress or prospect. No injurious cargoes to be shipped, nor any voyage undertaken nor goods nor cargoes loaded that would involve risk of seizure, capture or penalty by British or foreign rulers or Government. In the event of Great Britain or other European Power being involved in war affecting the working of the steamer at the commencement or during the currency of this charter . . . . charterers have the option of cancelling this charter, or to insure at their expense the steamer against all war risks for the full value under the present policy as approved by owners." The charterers had the option of sub-letting the steamer, they remaining responsible to the owners for the due fulfilment of the charterparty; and by a clause in writing at the end of the charterparty they had also "the option of continuing this charter for one further Baltic round at 1000*l.* per month."

By a sub-charter, dated July 2, 1914, it was agreed between the defendants, who were described therein as "time chartered owners" of the steamship *Dunolly*, and Messrs. George Horsley & Co. (who were the sub-charterers) that the *Dunolly*, "expected ready to load under this charter about 20th July," should proceed to St.

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Petersburg or 1/2 places in one district between Viborg and Helsingfors districts inclusive, and there load a full and complete cargo of props and therewith proceed to the Tyne, Wear, West Hartlepool, or Humber (one place only) as ordered on signing bills of lading, and deliver the same on being paid freight at the rate of 27*s.* 6*d.* per intaken piled fathom of 216 cubic feet on bill of lading quantity.

The facts were shortly as follows:—The *Dunolly* came on hire under the charterparty at 6 A.M. on July 4, 1914, and proceeded from Hull to Kronstadt with a cargo of coals. On arrival she discharged her cargo of coals, and on July 27 she began loading props at Fredrikshamn under the sub-charter. On July 30 she arrived at another port to take in further cargo, and while there the half-monthly instalment of hire became due. On August 5 she arrived at Hurppu in the Gulf of Finland, where she finished loading upon August 8.

Meanwhile war broke out between Russia and Germany on August 1, and between Great Britain and Germany upon the 4th, and upon the 5th the defendants purported to cancel the charterparty by the following telegram of that date addressed to the plaintiffs: "We hereby notify you that owing to Great Britain being at war affecting the working of *Dunolly*, we exercise our option and now cancel this steamer's charter with the proviso that we reserve our claim to proportion of freight to cover hire and charges already paid, and also reserving our right to claim any other losses or damages." This was followed by a letter of August 14, which is set out in the judgment of Swinfen Eady L.J. The plaintiffs declined to accept the notice of cancellation. After August 1 it was impossible for the *Dunolly* to leave the Baltic for England. The Russian authorities upon that date issued an order forbidding all vessels within the Viborg district, where Fredrikshamn and Hurppu were situated, from leaving the same. Upon August 10 the Russian authorities prohibited the export of wood goods, and the *Dunolly* in fact got no permission to carry such goods. No insurance of any sort could be obtained which would cover the ship on leaving the Gulf of Finland, and there were a number of other English vessels similarly caught in the Baltic, some of which found their way, as did the *Dunolly* at a later period, to Petrograd.

When the defendants gave their cancellation notice on August 5

the vessel had been partly loaded and the master had given bills of lading which were held by the sub-charterers. She was therefore not free from cargo or commitments. On August 31 the owners brought the crew home with the exception of the master and the engineer. The vessel was still detained in the Gulf of Finland.

The writ in the action was issued on November 6, 1914, and by it the plaintiffs claimed hire of the vessel from August 4 to November 4, both inclusive. The defendants had paid the first month's hire to August 3.

In the judgment of Swinfen Eady L.J. it is stated that "the parties were agreed that a 'Baltic round' ordinarily means a voyage to a Baltic port or ports, with leave to call at a port or ports substantially on the route thither, and returning from the Baltic to a coal port here, with leave to call at a port or ports substantially on the route to such coal port."

Sankey J. held that the defendants were liable inasmuch as (1.) the doctrine of the frustration of the adventure had no application; and (2.) they were not entitled to rely on their notice of cancellation because they were not in a position to hand over the vessel free of cargo and free of commitments.

The defendants appealed.

ADMIRAL SHIPPING COMPANY, LIMITED *v.* WEIDNER, HOPKINS & Co.

Appeal from the judgment of Bailhache J. upon an award stated in the form of a special case; reported [1916] 1 K. B. 429.

By a charterparty, dated June 22, 1914, which was (so far as material) in the same form as that in the last case, the Admiral Shipping Company, the owners of the steamship *Auldmuir*, agreed to let and the charterers, Messrs. Weidner, Hopkins & Co., agreed to hire the *Auldmuir* for "two Baltic rounds" at 865*l.* per calendar month. By a clause in writing at the end of the charterparty the charterers had "the option of cancelling this charter at the end of the first round," paying 890*l.* per month for the period used. No notice of cancellation was given. The steamship was delivered to the charterers on June 29, 1914, and she left Hull on July 4 for Kronstadt with a cargo of coals.

The facts are fully set out in the report of the case in the Court

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below. It is sufficient to state them shortly as follows:—By a sub-charterparty dated July 9, 1914, and made between Weidner, Hopkins & Co. as "time charterers" and Messrs. Pyman, Bell & Co. as charterers, the *Auldmuir* was chartered for a voyage from a port in Finland to, amongst other places, Blyth, Northumberland. On July 17 the steamship, having discharged her cargo of coals at Kronstadt, left for Viborg and Kotka under the charterparty of July 9 to load a cargo of pit props for Blyth. The steamship arrived at Viborg on July 18 and there loaded part of her cargo. She left Viborg on July 25 and arrived at Kotka on July 26 for the purpose of receiving the balance of her cargo. On August 1 the loading was completed, and bills of lading in respect of the cargo were signed, and the steamship was ready on that day to sail for Blyth, but she was detained at Kotka by the Russian naval authorities in the same way as the *Dunolly* in the last case was detained, and she was still detained. On August 28, 1914, the agents of the owners by telegram instructed the British Consul at Kotka to repatriate the crew other than the captain and chief engineer. No notice of cancellation was given. The hire for the steamship had been paid up to August 14, 1914, and no hire had been paid since. The owners claimed hire since that date, and the claim was referred to arbitration.

The arbitrators found, subject to the opinion of the Court, "that no time hire is due by the charterers to the owners during the time the said vessel has been and is stopped at the said port of Kotka under the circumstances aforesaid." The question for the opinion of the Court was whether that finding was right. The matter in that form came before Scrutton J., who remitted the award to the arbitrators to find whether at any and what time between August 14 and October 20, 1914 (the date of the hearing of the arbitration), there was any reasonable probability of proceeding with the chartered voyage in such a time as that the commercial adventure would not be frustrated, and whether any voyage could have been taken from Kotka between the above dates which would not have involved risk of seizure or capture by a foreign ruler. The arbitrators by a further award found that at no time between those dates was there any reasonable probability of the *Auldmuir* proceeding with the chartered voyage in such a time as that the commercial adventure

would not have been frustrated, and that no voyage could have been taken from Kotka between the above-named dates which would not have involved risk of seizure or capture by a foreign ruler.

Bailhache J. held that the charterers were liable for the hire.

The charterers appealed.

Sir John Simon, K.C., and *Sir Maurice Hill, K.C.* (*R. A. Wright* with them), for the defendants in the first case; and *Sir John Simon, K.C.*, and *MacKinnon, K.C.* (*R. A. Wright* with them), for the charterers in the second case. The adventure was in the first case one "Baltic round" and in the second case two "Baltic rounds." The charterparties were not time charterparties; they were charterparties for a specified adventure, namely, a Baltic round, though the hire of the ship was calculated at a certain sum per month. The vessel was not chartered for the period usually occupied in a Baltic round, but for the commercial adventure of a Baltic round. A "Baltic round" means going into the Baltic with cargo, calling at ports substantially en route, and discharging and loading at a Baltic port or ports, coming out again and calling at ports en route, and returning to a coal port in the United Kingdom. In both these cases the ship was prevented by the act of a superior authority from leaving the Baltic and was compelled to remain there for an indefinite time. It is an implied term of the charterparty that if supervening events, not due to the default of either party, render the performance of the Baltic round indefinitely impossible, the contract is dissolved. That term will be implied if it does not contradict any express term of the charterparty, though it may deal with the same subject-matter as that with which the express term deals. For instance, on a sale of goods an express warranty that the goods will pass a certain test does not exclude the warranty implied by law that they are reasonably fit for the purpose for which they are intended: *Bigge* v. *Parkinson* (1); Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14, sub-s. 4. See also *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada* (2); *Sleigh* v. *Tyser*. (3) So too in *Embiricos* v. *Reid & Co.* (4) there was an express clause

(1) (1862) 7 H. & N. 955.
(2) (1870) L. R. 3 P. C. 234.
(3) [1900] 2 Q. B. 333.
(4) [1914] 3 K. B. 45, 52.

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dealing with the event of war, and yet Scrutton J. held that the doctrine of the frustration of the adventure owing to war applied. Very clear words are necessary to exclude the implied term. It is said that the clause in the charterparty which provides that in the event of Great Britain or other European Power being involved in war affecting the working of the steamer the charterers shall have the option of cancelling or insuring the steamer against all war risks expressly deals with the same matter as that with which the implied term deals, and is inconsistent with the application of the implied term in the events which have happened. That clause, however, applies where there is an existing charterparty capable of being carried into effect, and it only gives a right to cancel where the option to insure is capable of being exercised. It contemplates the continued working of the vessel being possible though difficult, when the charterers must insure against war risks or cancel. In each of these cases the continued working of the vessel was impossible and she was quite uninsurable. The clause therefore did not apply in the circumstances, and it is not inconsistent with the implied term or condition above mentioned, under which no question of cancellation arises; the contract is gone. Even if the clause means that if insurance is impossible the charterers must cancel, it is not inconsistent with the existence of the implied term. In both these cases the commercial adventure of the Baltic round was frustrated within the doctrine laid down in *Jackson* v. *Union Marine Insurance Co.* (1) The principle upon which the decision in that case was based is the same as that on which such cases as *Taylor* v. *Caldwell* (2), *Krell* v. *Henry* (3), and *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (4) were decided, and it was followed in *Poussard* v. *Spiers* (5), *Tully* v. *Howling* (6) (by Brett J.), *Embiricos* v. *Reid & Co.* (7), *Horlock* v. *Beal* (8), and *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (9) In this last case Lord Parker (10), while pointing out that it was more difficult to apply the principle to time charters than to

(1) (1873) L. R. 8 C. P. 572; (1874) L. R. 10 C. P. 125.
(2) (1863) 3 B. & S. 826.
(3) [1903] 2 K. B. 740.
(4) [1903] 2 K. B. 756.
(5) (1876) 1 Q. B. D. 410, 414.
(6) (1877) 2 Q. B. D. 182, 188.
(7) [1914] 3 K. B. 45.
(8) [1916] 1 A. C. 486.
(9) [1916] 2 A. C. 397.
(10) Ibid. 425.

voyage charters, refused to say that it never could be applicable to time charters. In that case the charter was a time charter, and the House of Lords only held that on the facts of that case the interruption was not such as to put an end to the charterparty. Even, therefore, if this were a time charter the doctrine would apply. But it is not a time charter ; it is a charter for a definite voyage, the payment for which is measured by the time occupied. The application of the doctrine of the frustration of the adventure is independent of the exception of " restraint of princes." That exception assumes the continued existence of the contract, and relieves the party from liability for what would otherwise be a breach of contract. It is quite consistent with that clause that a term should be implied that a supervening event, even though caused by a restraint of princes, should put an end to the contract. The commercial adventure having been frustrated, the charterparty is determined. [*The Savona* (1), *Braemount S.S. Co.* v. *Weir & Co.* (2), and *Arnhold Karberg & Co.* v. *Blythe & Co.* (3) were also referred to.]

Leck, *K.C.*, and *Raeburn*, for the shipowners in both cases. These charterparties were time charterparties. They were on a time charter form, and in the sub-charterparties the charterers were described in the one case as " time chartered owners " and in the other as " time charterers." In a voyage charterparty for the carriage of goods from one place to another both shipowner and charterer are interested in the completion of the voyage, because the charterer's object is to have his goods carried to their destination, and the shipowner's object is to earn his freight by carrying the goods to their destination. In a time charterparty the only object of the shipowner is to receive the freight which is payable according to time, and to have his ship redelivered to him at the expiration of the period named in the charterparty. There is, generally speaking, no common object in which both parties are interested ; there is no voyage in the completion of which both are interested. The contract is determined " where the delay is so long as to frustrate the mercantile adventure as at first contemplated by both parties " : *Hudson* v. *Hill.* (4) The

(1) [1900] P. 252, 259.
(2) (1910) 15 Com. Cas. 101.
(3) [1915] 2 K. B. 379, 390, 391.
(4) (1874) 43 L. J. (C.P.) 273, 279, per Brett J.

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interruption was not so great as in *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (1), where the House of Lords held that the contract was not determined. Though it cannot be said that in no case will the doctrine of frustration of the commercial adventure be applicable to a time charterparty, at the same time, as Lord Parker said (2), there is no case to be found in which it has been applied to time charterparties as distinguished from charterparties which contemplate particular voyages, and its application in such a case is much more difficult. The interruption here arose from the act of a friendly Power imposing what amounts to an embargo on the vessel. In *Tully* v. *Howling* (3) the charterparty was for twelve months, and, as pointed out by Lord Parker in *Tamplin Steamship Co.'s Case* (4), Brett J. was the only judge who put the case as one of the frustration of a commercial adventure. *Horlock* v. *Beal* (5) was a case of a contract of service, though in one sense it may be looked at as a time adventure. In *Braemount S.S. Co.* v. *Weir & Co.* (6) the existence of a strike preventing the loading of the cargo was held not to have frustrated the commercial adventure. There was therefore no frustration of any commercial adventure in the present case. [*Hadley* v. *Clarke* (7) and *Herne Bay Steam Boat Co.* v. *Hutton* (8) were also referred to.]

Next, to imply in the charterparty a term bringing about the frustration of the adventure upon the happening of some event would be inconsistent with the express provision of the charterparty as to cancelling or insuring in the event of war affecting the working of the steamer. The clause means that the charterers have the option in that event of cancelling or maintaining the charterparty, but in the latter event they must insure. The right of maintaining the charterparty is in favour of the charterers; the duty to insure is in favour of the shipowners, a provision which they can waive. If the condition as to frustration of the adventure is to be implied in the charterparty, how can the charterers say that the charterparty is determined when they have an option to cancel or not? The charterers may have a sub-charter at a higher rate of

(1) [1916] 2 A. C. 397.
(2) Ibid. 424, 425.
(3) 2 Q. B. D. 182.
(4) [1916] 2 A. C. 425.
(5) [1916] 1 A. C. 486.
(6) 15 Com. Cas. 101.
(7) (1799) 8 T. R. 259.
(8) [1903] 2 K. B. 683.

freight, and they may wish to keep the charterparty alive and earn the profit freight.

Sir John Simon, K.C., in reply. If the parties contracted upon the basis of the existence of a certain state of things and it does not exist, it is no answer for one of the parties to say that he was only interested in receiving money, and therefore had no interest in the adventure being carried out. In *Krell* v. *Henry* (1) the plaintiff was only interested in receiving the money. [He referred to *Blakeley* v. *Muller & Co.* (2)]

Cur. adv. vult.

Nov. 17. SWINFEN EADY L.J. read the following judgment :— The circumstances in these two appeals are very similar, but I will deal first with *Scottish Navigation Co.* v. *W. A. Souter & Co.*, which is reported in [1916] 1 K. B. 675, where the facts are fully stated. The question raised by the appeal is whether the defendants are liable to pay to the plaintiffs certain arrears of hire under a charterparty.

By a charterparty dated June 30, 1914, the plaintiffs agreed to let and the defendants to hire the steamship *Dunolly* for " one Baltic round " at the rate of 975*l.* per calendar month, commencing on and from delivery of the vessel to the defendants as therein provided, and at and after the same rate for any part of a month used to complete a voyage until redelivery (unless lost) to the owners in the same good order and condition as when accepted at a coal port in the United Kingdom, the said hire to be paid half-monthly in advance at Glasgow, charterers to have the option of sub-letting. The charterparty provided for cesser of hire in the event of loss of time from deficiency of men or stores or breakdown of machinery, but should the vessel be driven into port or to an anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time to be at charterers' expense ; and should steamer be detained by ice or quarantine same to be for charterers' account, and time to count. Arrests and restraints of princes (inter alia) always mutually excepted. Should the vessel be lost, hire to cease and determine on the day of her loss, and any hire paid in advance and not earned to be returned to the charterers. The vessel came on hire on July 4,

(1) [1903] 2 K. B. 740. (2) [1903] 2 K. B. 760, n.

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1914, and proceeded from Hull to Kronstadt with a cargo of coals.

The parties were agreed that a " Baltic round " ordinarily means a voyage to a Baltic port or ports, with leave to call at a port or ports substantially on the route thither, and returning from the Baltic to a coal port here, with leave to call at a port or ports substantially on the route to such coal port.

By a sub-charterparty dated July 2, 1914, the defendants sub-chartered the vessel to Messrs. George Horsley & Co., Limited, for a voyage from Petrograd or 1/2 places in one district between Viborg and Helsingfors districts inclusive, with a full and complete cargo of props to the Tyne, Wear, West Hartlepool, or Humber (one place only), on being paid freight at the rate of 27*s.* 6*d.* per intaken piled fathom of 216 cubic feet.

By July 27, 1914, the vessel had discharged her outward cargo of coal and had begun loading props under the sub-charter at Fredrikshamn in the Gulf of Finland, whence she proceeded to Kalciyarvi, where she continued loading. On August 1, 1914, war broke out between Russia and Germany. Ever since this date the vessel has been, and still is, detained in the Gulf of Finland by orders of the Russian Government and is not allowed to leave. Considerable difficulty and delay arose in telegraphic communication. The master of the steamer on August 2 sent a telegram to the charterers that the Customs refused clearance for the vessel. On August 4 war broke out between this country and Germany. On August 5 the defendants telegraphed a notice to the plaintiffs that owing to Great Britain being at war, affecting the working of the steamer, they exercised their option and cancelled the steamer's charter, reserving their claim to proportion of freight to cover hire and charges already paid. On the same day the defendants wrote to the plaintiffs confirming this telegram; and in a letter of August 14, 1914, the defendants added: " Now that we know the whereabouts of the vessel, it is our duty to notify you that we transfer her homeward charter to you, also the responsibility for any expenses and charges connected therewith. Enclosed we beg to hand you copy of the homeward charter for your guidance. The rate of freight inserted in same, namely 27*s.* 6*d.* per fathom, is our contract rate with Messrs. Horsley. The current rate at the time vessel was

stemmed was 25*s.* 6*d.* and we reserve our right to claim this difference of freight. Any further documents or charges that we may receive we will pass on to you in due course."

The plaintiffs declined to accept the notice of cancellation of the charter, and the parties were at issue. On August 31, 1914, pursuant to the instructions of the owners, the crew left the vessel and returned home to England, only the captain and the engineer remaining on board in charge of the vessel. The detention of the vessel, owing to the existence of a state of war, has continued now for two years and three months, and may continue for an indefinite longer period. The judge was satisfied that it was impossible for the *Dunolly* to leave the Baltic for England after August 1. No insurance could be obtained which would cover the ship on leaving the Gulf of Finland.

The plaintiffs contended that the notice of cancellation was invalid, and that there was not any right to cancel under the circumstances, and that the hire had continued to run on and that the arrears were payable because the events which had happened did not bring the case within the cesser clause.

The writ in the action was issued on November 6, 1914, and the plaintiffs thereby claim 3412*l.* 10*s.*, being the amount of hire alleged to have accrued under the charterparty between August 4 and November 4, 1914, and at the trial the plaintiffs obtained judgment for that amount. The hire for the calendar month July 4 to August 3 was paid in due course in July.

I am of opinion that according to the true construction of the charterparty the defendants had not any right to give a notice cancelling it under the circumstances which arose. The clause in the charterparty provides that no voyage is to be undertaken that would involve risk of seizure or capture, and this provision alone was sufficient to preclude the vessel from sailing from the Gulf of Finland on and after August 1, 1914. The clause next provides that in the event of Great Britain or other European Power being involved in war affecting the working of the steamer at the commencement or during the currency of the charter, the charterers are to have the option of cancelling the charter or insuring the steamer against all war risks for its full value. This clause on its true construction provides for a particular contingency, namely,

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the event of war, at a time when the charterer is able to take either of two courses, both of which are open, but he must elect which he takes—namely, cancel or insure against war risks. On August 1 this vessel in the Gulf of Finland was no longer insurable against war risks. It was quite uninsurable. The clause does not in my opinion enable the charterer to cancel the charter after the vessel has been exposed to the risk and has been detained indefinitely by a Sovereign who has become involved in war when the vessel is no longer insurable, and when the charterer is unable to redeliver it to the owner either immediately or within any reasonable time. The notice of cancellation did not when given and could not under the circumstances determine the charter.

There remains the question whether the charterers remain liable for the hire claimed in the action. The charter was for a particular marine adventure compendiously described as a "Baltic round" —a voyage to the Baltic and home, with the liberties before mentioned, and accepted by the parties as coming within what is described as a "Baltic round." The ship is not hired for any definite time, although payment for the Baltic round is calculated by reference to the time occupied. It is not true to say that the ship was merely hired for such period of time as is ordinarily taken in completing a Baltic round. The charterers had no right under the charterparty to require the ship to go elsewhere than on a Baltic round (as, for instance, on a voyage to the Mediterranean), nor had they any right to lay up the ship for a time, instead of sailing her, as they would have under an ordinary time charter for a definite period.

In my judgment, the principle upon which this case falls to be determined is that both parties contemplated from the first a mercantile adventure—a Baltic round ; a voyage to the Baltic and back again to be paid for according to the time occupied—and that the enforced delay by reason of the war is of such long and indefinite duration as completely to frustrate the adventure in a mercantile sense, and that the original contract is thereby determined and cannot be enforced. The "Baltic round" which was the subject of the adventure is quite impracticable in a commercial sense. It is not a case in which the charterers have bound themselves absolutely and in any event to continue to pay the hire until

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the ship is restored to the owners. If that were so, they would continue liable to make the monthly payment of 975*l.* for an indefinite period.

Paraphrasing the language of Lord Loreburn in *Horlock* v. *Beal* (1), I think it was an implied term of this charterparty that it should be practicable for this ship to sail on this voyage, in that sense which disregards minor interruptions and takes notice only of what substantially ends the possibility of the contemplated adventure being carried out. Both shipowner and charterer made their bargain on the footing that, whatever temporary interruption might supervene, the ship and crew would be available to carry out the adventure of a Baltic round. The further performance of the contract contained in the charterparty became impossible upon the ship being detained for a long and indefinite period. It was urged that here there was no impossibility, as all that the charterers had to do was to continue to pay the monthly hire, and the detention of the ship did not render that impossible. The same argument would have equally applied in *Horlock* v. *Beal* (2) in the claim for seamen's wages, namely, that the detention of the ship did not prevent the owners from paying the amount of the allotment note, which was all that the plaintiff there claimed. It is the further performance of the contract by one party which formed the consideration for the payment by the other, which has become impossible, and this effects a dissolution of the contract.

It was contended that the charterparty in the present case contained a clause providing for the cesser of hire under certain circumstances, and that the effect of such a clause was to exclude any implication that the hire might cease under other circumstances. The answer to this argument is that the effect of what has happened is not merely to suspend liability to pay hire, but to dissolve the contract, and accordingly there is no longer any subsisting contract under which hire is payable.

In my judgment the charterparty must be taken to have been entered into under the implied condition that, if supervening events (not due to the default of either party) rendered the performance of the "Baltic round" indefinitely impossible, the contract should

(1) [1916] 1 A. C. 494. (2) [1916] 1 A. C. 486.

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be deemed to be dissolved. See *Geipel* v. *Smith* (1) and *Horlock* v. *Beal.* (2) Here a contract has been entered into which by a supervening cause beyond the control of either party has become impossible or impracticable in a commercial sense, and the charterers have not, according to the true construction of the written contract, expressly taken upon themselves the risk of such a supervening cause; upon the occurrence of that cause both parties were and are excused from any further performance. The case comes within the principle of *Taylor* v. *Caldwell* (3) and *Appleby* v. *Myers.* (4) In *Taylor* v. *Caldwell* (3) and in *Appleby* v. *Myers* (4) the further performance of the contract had become absolutely and physically impossible, and not merely impossible in a commercial sense. In the former case the one party could not give to the other the use of a certain music-hall, as it had been destroyed by fire. In the latter case the steam engine and machinery could not be erected upon and affixed to the defendants' premises unless these continued in a fit state to enable the work to be performed on them, and they had in fact been burnt down. Nevertheless the principle which was applied in these cases is not limited in English law to cases of physical impossibility. In *Krell v. Henry* (5) it was quite possible for the plaintiff to give possession of the flat in Pall Mall for the occupation of which the defendant had agreed to pay. In that case Vaughan Williams L.J. pointed out (6) the wider application of the principle and said that it applied to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things going to the root of the contract and essential to its performance. It was urged that such a doctrine cannot from its nature properly apply to a charter where there is no "adventure" in which the parties are jointly interested liable to be "frustrated," and reliance was placed upon the observations of Lord Parker in *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (7): "Without laying it down that the principle" (of the frustration of a commercial adventure) "can in no circumstances be applicable to time

(1) (1872) L. R. 7 Q. B. 404.
(2) [1916] 1 A. C. 486.
(3) 3 B. & S. 826.
(4) (1867) L. R. 2 C. P. 651.
(5) [1903] 2 K. B. 740.
(6) Ibid. 748.
(7) [1916] 2 A. C. 425.

charterparties, I am of opinion that its application is in such cases much more difficult than in the case of charterparties which contemplate a definite voyage within certain limits of time." Whatever difficulty there may be in the application of the principle to ordinary time charters, where no particular voyages are contemplated, and where the time charterer is at liberty to sail the ship or not as he likes, and where he obtains the control of the ship for a definite period, whether he sails her or not, such difficulty is not insuperable in a case like the present, where the charterparty is for a definite voyage out and home, the limits of which are completely defined by the mercantile language used, and which furnishes a standard for the computation of the time for which the charter is expected to continue.

I am of opinion that the appeal should be allowed and judgment entered for the charterers, the defendants.

In the case of *Admiral Shipping Co.* v. *Weidner, Hopkins & Co.* the facts are fully set out in the report of the case before Bailhache J. (1) The steamship *Auldmuir* was the subject of a charterparty dated June 22, 1914, and the position is very similar to that of the *Dunolly ;* but the *Auldmuir* was chartered for two Baltic rounds, the charterers to have the option of cancelling the charter at the end of the first round, paying in that event a slightly increased hire for the period used. No notice of cancellation was ever given. This vessel discharged her outward cargo, and when fully loaded with a return cargo of wood goods for Blyth she was detained by the Russian authorities at Kotka in the Gulf of Finland on the outbreak of war on August 1, and has not since been allowed to leave. The dispute between the parties was the subject of an arbitration, and the award was made in the form of a special case. It came before Scrutton J., and he made an order on March 17, 1915, remitting the case to the arbitrators to find whether at any and what time between August 14 (up to which date hire had been paid in advance) and October 20, 1914 (the date of the hearing of the arbitration), there was any reasonable probability of proceeding with the chartered voyage in such a time as that the commercial adventure would not be frustrated, and whether any voyage could have been taken from Kotka in the Gulf of Finland between August 14 and October 20,

(1) [1916] 1 K. B. 429.

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1914, which would not have involved risk of seizure or capture by a foreign ruler.

On September 21, 1915, the arbitrators made a further award and found and declared that at no time between August 14 and October 20 was there any reasonable probability of the steamship *Auldmuir* proceeding with the chartered voyage in such a time that the commercial adventure would not be frustrated. And they also found that no voyage could have been taken from Kotka between August 14 and October 20, 1914, which would not have involved risk of seizure or capture by a foreign ruler.

In my judgment the same considerations apply in the case of this vessel as in the steamship *Dunolly*. The contract comprised in the charterparty became impossible of performance and was dissolved and both parties excused from its further performance.

In giving judgment on the hearing before him of the special case and the further award, Bailhache J. gave a very careful definition of the meaning of the commercial frustration of an adventure by delay. If the object which both parties had in view, when they entered into the charterparty in the present case, was one or two "Baltic rounds," and if it was for the accomplishment of that object that the contract was made, and the delay is such as to prevent the fulfilment of that object, then the delay amounts to frustration within that definition. I regret to differ from the learned judge upon the construction of the charterparty, as, in my opinion, the charterers were not entitled, if they pleased, to lay up the *Auldmuir*, nor might they have sent her to the Mediterranean instead of on a Baltic round. The voyage out and home is particularly defined and described, for which the payment is not to be an agreed sum or at an agreed rate of freight, but is to be according to the time occupied. By reason of the detention of the ship in the Gulf of Finland the charterers are wholly deprived of the use of her for an indefinite period.

Again, it was urged that it was impossible to apply the doctrine of frustration to a case where one of the parties to a contract is fulfilling his part of the contract according to its terms. But this leaves out of consideration the implied term. In *Jackson* v. *Union Marine Insurance Co.* (1) the shipowner had observed the

(1) L. R. 10 C. P. 125.

terms expressed. He had agreed to send his ship to Newport to load rails there, dangers and accidents of navigation excepted. He did fulfil his part of the contract according to its terms, the vessel being duly sent and only delayed by an accident of navigation. But the Court held that an additional term was implied, that the ship should arrive there "at such a time that in a commercial sense the commercial speculation entered into by the shipowner and charterers should not be at an end, but in existence." (1) Not arriving at such a time put an end to the contract, though, as it arose from an excepted peril, it gave no cause of action.

It was also contended that the charterparty had made provision for war—a contingency that had happened; and where the contract provides for a given contingency it is not for the Court to import into the contract a different provision for the same contingency under another name. The provision referred to was the option to cancel the charter, and this option I have already dealt with in the previous case. For the reasons already stated in this case and in the one which has just preceded it, I am of opinion that the appeal should be allowed and the special case should be answered by saying that upon the facts therein and in the further award stated and found, and upon the true construction of the charterparty of June 22, 1914, the arbitrators were right in their finding and award that no time hire is due by the charterers to the owners during the time the vessel has been and is stopped at Kotka. That is the form in which the question was raised before the arbitrators.

BANKES L.J. read the following judgment:—These two appeals were heard together. The one is an appeal from a judgment of Sankey J. after the trial of the action in the Commercial Court. The other is an appeal from the judgment of Bailhache J. on an award stated by arbitrators in the form of a special case for the opinion of the Court.

It is not necessary that I should restate the facts. They are fully set out in the reports of the judgments in the Courts below. It is sufficient for my purpose to say that except upon one point, to which I refer later, I consider that no material distinction can be drawn between the facts in the two cases. In each case the claim

(1) L. R. 10 C. P. 143.

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of the respondents was for a sum alleged to be due for the hire of a vessel chartered by the respondents to the appellants. In each case the main defence of the appellants was that the doctrine commonly spoken of as " the frustration of the adventure " applied to their case, and that in consequence they were relieved from any obligation to pay the sums claimed. In each case the judgment in the Court below was in favour of the respondents upon the ground that the doctrine had no application having regard to the terms of the contracts into which the appellants had entered.

So far as the facts are concerned both cases must, I think, be treated on the footing that from a business point of view there had been a frustration of the adventure in each case. In the *Admiral Shipping Company's Case* the special case stated by the arbitrators was remitted to them by Scrutton J. for a finding upon the question whether between August 14 and October 20, 1914, there was any reasonable probability of proceeding with the chartered voyage in such a time that the commercial adventure would not be frustrated, and whether any voyage could be taken from Kotka between August 14 and October 20, 1914, which would not involve risk of seizure or capture by a foreign ruler. The arbitrators' answer to both questions was in the negative. In the *Scottish Navigation Company's Case* Sankey J. gave no decision on this point. From the view he took of the case it was not necessary for him to do so. No distinction was sought to be drawn during the argument before us between the two cases so far as the facts material to this point are concerned. I therefore treat the two cases as though in both of them the facts on this point had been found against the respondents.

It remains, therefore, only to consider whether the doctrine of the frustration of the adventure has any application to these cases. Bailhache J. (1) defines the doctrine thus: " The commercial frustration of an adventure by delay means, as I understand it, the happening of some unforeseen delay without the fault of either party to a contract of such a character as that by it the fulfilment of the contract in the only way in which fulfilment is contemplated and practicable is so inordinately postponed that its fulfilment when the delay is over will not accomplish the only object or objects

(1) [1916] 1 K. B. 436, 437.

which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made." As applicable to the present cases no objection was taken to this definition by any of the counsel for the parties concerned; and it appears to me to be entirely in accordance with the previous decisions upon the point. It is not, I think, necessary to travel through the cases to which our attention has been called in support of this conclusion, and I refer only to the judgment of Vaughan Williams L.J. in *Krell* v. *Henry* (1), where the development of the doctrine is historically treated. The speech of Lord Parker in the very recent case of *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (2) appears to me to contain several passages which are of great value in considering whether the doctrine in question is applicable in the cases which we have now under consideration. In the first place he disposes of the suggestion which has often been made that the doctrine has no application to time charters by pointing out that the true view on this point is, not that the principle can in no circumstances be applicable to time charterparties, but that its application is in such cases much more difficult than in the case of charterparties which contemplate a definite voyage within definite limits of time. (3) This view of the law is accepted by the respondents' counsel in these appeals. Again (4), in speaking of conditions which may be implied as frustrating an adventure he deals both with conditions precedent and conditions subsequent, and points out that, though the former may be more easily applied than the latter, it is legitimate to imply the latter where circumstances warrant it. He deals expressly with the case of charterparties where he says (5): "It" (the principle) "applies also to charterparties where some commercial adventure contemplated by the parties, and in the fulfilment of which both are interested, is brought to an end by the happening of some event for which neither is to blame." He deals also with the foundation on which the principle rests, and points out that the principle is one of contract law depending upon some term or

(1) [1903] 2 K. B. 740.
(2) [1916] 2 A. C. 397.
(3) Ibid. 425.
(4) Ibid. 423.
(5) Ibid. 424.

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condition to be implied in the contract itself, from which it follows that no term or condition can be implied in a contract which is inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions. (1)

I come now to the two questions which, after a consideration of the authorities and the arguments addressed to us, appear to me to be those which require answering in order to dispose of the main point which is in contest between the parties and which is common to both appeals. These questions are, first, Do the charterparties which were entered into between the shipowners and the charterers contemplate an adventure in which both were interested? Second, If they do, do the terms of those charterparties exclude the implied condition relied on by the charterers? Both Sankey J. and Bailhache J. have answered the first question in the negative, and on that ground have decided against the appellants. There is no doubt as to Bailhache J.'s view. He construes the charterparties as time charters pure and simple. He considers that the charterers in the case he was considering might have laid the vessel up, or sent her to Continental ports or to the Mediterranean, and that there was no obligation on the charterers, if they did not lay her up, to employ her in trading to a Baltic port at all. Sankey J. was content to express the opinion that the charter was a time charter which did not provide for either a definite voyage or a definite object contemplated at first by both parties. I hesitate to differ from these two learned judges who have so much experience in shipping matters, but upon the construction of these particular charterparties I cannot bring myself to agree with them. After the expression of opinion by Lord Parker to which I have already referred and to which counsel assent, it seems to me immaterial to consider whether these charterparties can or cannot properly be called time charters. In some senses no doubt they are. The material question, however, which has to be decided is whether the expressions "one Baltic round" in the case of the *Dunolly* and "two Baltic rounds" in the case of the *Auldmuir* are, having regard to the other provisions in the charterparties, words of description of the voyage or voyages, or of parts of the voyage or voyages, to be undertaken by the vessels, or whether they are words descriptive

(1) [1916] 2 A. C. 422.

merely of the area within which the charterers may employ the vessels and of the measure of time for which the vessels are respectively chartered. In the one case the doctrine relied upon by the appellants would, in my opinion, apply ; in the other it would not. The question is one of construction. In the first place, what is the natural meaning of the words ? What is the natural inference to be drawn where one party agrees to let and the other to hire a vessel for " one Baltic round " or for " two Baltic rounds " as the case may be ? Are the parties agreeing that the vessel is to be employed as the charterer pleases for the time usually occupied or reasonably occupied in going a Baltic round, or are they agreeing that the vessel shall be employed in actually going a Baltic round ? In my opinion the latter is the natural and proper meaning to be given to the language used. It was assumed in the Court below that the expression " Baltic round " has a well-known meaning in the shipping trade, but the exact meaning was not gone into. During the hearing in this Court counsel were content for the purposes of these appeals to treat a Baltic round as meaning a voyage from a port in the United Kingdom to a port or ports in the Baltic, with liberty to call at United Kingdom or Continental ports substantially on the way there, and returning from a Baltic port or ports to a coal port in the United Kingdom, with the same liberty to call at ports en route.

There is nothing in the charterparties, in my opinion, which is inconsistent with the view that these charterparties must be construed as if the words " Baltic round " had been written out at length as above defined. On the contrary I think that the other provisions of the charterparty confirm this view. In both charterparties the payment of hire is per month commencing on and from delivery and continuing until redelivery of steamer (unless lost) to owners at a coal port in the United Kingdom. When is the redelivery to take place ? Is it when the vessel shall have completed the contemplated voyage which fixes the time with certainty, though it may have been longer or shorter than one or both of the parties anticipated ; or is it to take place at a time selected by the charterer upon his estimate of what the proper time to be allowed for a Baltic round should be ? It seems to me that the latter would be so unlikely an arrangement to make and one so likely to lead to

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disputes that it is improbable that business people would ever have consented to it. The written clause inserted at the end of each of the charterparties confirms me in the view I have taken of these contracts. The language employed in the case of the *Auldmuir* is perhaps stronger than that used in the case of the *Dunolly*. When the parties in the former case speak of " the end of the first round " the natural meaning of the words appears to me to be when the round is in fact completed, and not at the expiration of a period of time ordinarily or reasonably allowed for a round.

The conclusion, therefore, to which I come on this part of these cases is that the parties did by the language they used contemplate and provide for an adventure, namely, a " Baltic round," in which they were both interested, and that the doctrine invoked by the appellants applies just as much as if the expression " Baltic round " as explained above had been written out in full in both charterparties.

I pass now to the second question, and to this I apply the language of Lord Parker to which I have already referred. Is there anything in the express provisions of these charterparties or in the intention of the parties as gathered from those provisions which is inconsistent with the implied condition sought to be introduced by the appellants ? I think not. On the first branch of this question the respondents rely upon the clause with reference to the cancellation of the charterparty and contend that this clause expressly deals with the event which happened and provides the course, and the only course, the charterers can take if they desire to be relieved from the obligations of the charter. The clause relied on provides that in the event of Great Britain or other European Power being involved in war affecting the working of the steamer charterers to have the option of cancelling this charter or to insure at their expense the steamer against all war risks for the full value under the present policy as approved by the owners. The construction of the clause is not free from difficulty, but having regard to the language used it appears to me not to apply at all in the events which have happened. Assuming the existence of the adventure and the fact that it has become frustrated, the contract as contained in the charterparty has come to an end. Under these circumstances, how can the charterer cancel the charterparty or insure the vessel in which he has no longer any insurable interest ? To speak, therefore, of the

charterer's option to take one or other of these courses is to speak of a state of things which assumes the continued existence of the contract, or in other words a temporary affecting of the working of the steamer as opposed to something of so serious a character as to prevent any working of the steamer at all for a period sufficient to amount to a frustration of the adventure. Assuming this construction of this clause to be correct, it practically disposes of any argument on the second branch of this question, because, if the parties have deliberately restricted the expressed provisions of the charterparty to some temporary interruptions by reason of war, they cannot be assumed to have excluded the implied condition which would come into operation in the event of the more serious interruption taking place. Apart from this consideration of this clause I should arrive at the same conclusion from a consideration of the other provisions in these charterparties. The mere introduction of exceptions or stipulations dealing with certain contemplated contingencies, even if they may be many in number, is not of itself sufficient to indicate an intention to exclude the implied condition. The charterparty in the case of *Jackson* v. *Union Marine Insurance Co.* (1) contained an exception of perils of the seas, but this did not prevent the stranding being treated as putting an end to the adventure. The charterparty in the recent *Tamplin Steamship Co.'s Case* (2) contained an exception of restraint of princes, but this, in the opinion of Lord Haldane, did not extend to every restraint however prolonged and the effect of which was to frustrate the adventure. In the present cases I find nothing in the charterparties which appears to me to indicate an intention that the doctrine relied on should be excluded. On the contrary, the intention apart from the expressed provisions appears to be the other way. Take for instance the payment of the hire. Hire must continue to be paid until the vessel is redelivered at a United Kingdom coal port. No voyage may be undertaken which may involve risk of seizure or capture. Delay in consequence of not being able to start on the homeward voyage in consequence of such risk is not within the cesser of hire clause. It seems to me possible that the parties may from the language they used have contemplated a mere delay in the prosecution of the adventure being at the risk of the charterer, but I cannot gather from

(1) L. R. 10 C. P. 125. (2) [1916] 2 A. C. 397.

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that language the intention that the charterer should, after the adventure had become commercially impossible, continue liable to pay the hire for a vessel which by the terms of the charter he was forbidden to bring to the only place at which he could terminate his obligation to pay that hire.

For these reasons I come to the conclusion that the appellants are entitled to succeed on both the questions which I have indicated above.

With the consequences of this decision we are not concerned. It is one of those cases in which one of two innocent parties must suffer. In the present case the shipowner has apparently only been able to reduce the loss by bringing home the crew; but in many cases the circumstances may be such that either by a sale of the vessel or by employing her in some other way a loss may be reduced or altogether avoided; whereas the charterer would under any circumstances be helpless to reduce his loss by a single penny.

Having regard to the conclusion to which I have come with regard to the main point, it is unnecessary to express any opinion upon the point raised in Messrs. Souter's appeal as to the cancellation of the charterparty. In my opinion both appeals succeed, and judgment should be entered in the manner indicated by Swinfen Eady L.J.

LAWRENCE J. read the following judgment:—The facts of these cases have been sufficiently stated. I will only mention two upon which this judgment is founded. (1.) It is found as a fact that the steamship *Dunolly* has since August 1, 1914, been and still is detained in Russian territorial waters under and by virtue of an order of the Russian Government amounting to a "restraint of princes." (2.) In the case of the steamship *Auldmuir* there is a finding by the arbitrators that her detention under a like order amounted to a "frustration of the adventure" contemplated by the charterparty. The only material difference in the facts of these cases is that in that of the *Dunolly* a notice purporting to be a cancellation of the charterparty under the clause in line 74 (1) was given by the charterers, whereas in the case of the *Auldmuir* there was no such notice.

(1) The clauses in the charterparty were not numbered, but each line was numbered. Lines 73, 74, and 75 contained the clause beginning "In the event of Great Britain or other European Power being involved in war."

The clause (line 74) does not apply in the circumstances which have occurred. It was not the "working" of the steamer upon the adventure which was "affected." No insurance was possible, and the vessel could not sail down the Baltic at all. This clause was intended to meet and its language covers an entirely different set of facts to those which had arisen in August, 1914. I agree with Sankey J. that the charterers are only entitled to give such a notice when they are ready and willing to hand over the vessel free (within a reasonable time) of cargo and of commitments.

Sir John Simon suggested that the charterers could terminate the contract by cancellation and pay damages for any loss or damage the shipowners might sustain by reason of the circumstances under which the ship then was. I do not think this contention can be sound. They cannot at one and the same time have a right to cancel and a liability in damages for having exercised their right.

This leaves but one question for consideration in the case of each of these vessels, namely, Does the doctrine of the frustration of the commercial adventure apply here? I am inclined to think these are time charters and not voyage charters. I think so because the form is a time charter form, the charterer is called at least once (line 88) a time charterer, and he so describes himself in his sub-charter; but chiefly I think so because the charterparty seems to me to provide for two quite different kinds of voyage—one a round voyage in the Baltic, calling, it may be, at several ports in that sea; the other a voyage to ports on the Continent of Europe and merely entering the Baltic for one port. I agree that it is more difficult to imply a condition defeating the contract in the case of a time charter than in the case of a voyage charter. Especially is this so if the time for which the ship is still under charter when the question arises is of long duration; this because it is then difficult if not impossible to say that the adventures contemplated by the parties are all defeated. It becomes comparatively easy when the adventure is definite and specific as in the case of a voyage charter. Here the charterparty is of very limited duration and scope. The doctrine is not peculiar to charters; it is applicable to all contracts. No such condition should be implied when it is possible to hold that reasonable men could have contemplated the circumstances as they exist and yet have entered into the bargain expressed in the document.

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I think that all reasonable commercial men would agree that charters are subject to the condition that the circumstances remain such that the chartered services of the ship shall not for an unreasonable time be rendered unavailable; that if from no default of either party those services can neither be rendered by the shipowner nor enjoyed by the charterer for an unreasonable time then the contract shall be at an end. In commerce time and money depend the one upon the other. Here a Baltic round, though of uncertain duration, is admittedly a matter of a few months. During the argument counsel on both sides seemed to speak of it as occupying three or four months, and I should think this is about the usual duration. These ships are still in the Baltic unable to get away; this war may last for many more months, or even years.

If some such condition is not to be implied the charterparty still binds the parties, the one to pay the hire, the other to have the ship ready and willing to sail under the charter. The one who contemplated an expenditure of 5000*l.* or 6000*l.* may have to pay 30,000*l.* to 40,000*l.* or even 100,000*l.* The other who contemplated having his ship free and at his own disposal in a few months has to wait years. It seems to me that a condition whereby such a restraint as this determines the charterparty must be implied if we are to attribute ordinary commercial reason to the parties to it. The charterer pays hire and gets no commercial advantage; the shipowner keeps his ship ready to sail and gets only pre-war rates of hire. Unless the Russian Government is much more far-sighted than the English Government, freights have risen there as here, and the shipowner might be earning the higher rates in that portion of the Baltic commanded by the Russian fleet.

Sankey J. holds that "frustration of the adventure" cannot be applied upon these facts because he regards the shipowner's only object as being to earn the charterparty freight or hire. I cannot agree with this. The subject of the contract is the services of the ship in accordance with the terms of the charterparty; the owner's object is, or should be, to afford those services, while the charterer's object is to enjoy them; it is true that the motive of each is money. Bailhache J. in his judgment states the common object, and also states in language that I adopt the doctrine as to frustration of the adventure. He declines to apply it to the facts of the case before

him (notwithstanding the finding of the arbitrators) because he would have to consider the duration of the restraint in order to see whether it amounted to a "frustration" of the adventure, and this would be to make a new contract for the parties.

I cannot accept this view. One must, of course, consider the duration of the restraint in order to see whether it determines the contract; but doing so does not make a new contract. Whenever a term is implied in a contract, it is a term added to those which are expressed; but it is not a new contract, because, if it is properly implied, then by the hypothesis it was in the contract already. The fact that if you improperly imply a term you make a new contract for the parties is a strong reason for being careful in seeing that it must have been intended by the parties, if you are to regard them as reasonable men entering upon a commercial adventure. In *Jackson* v. *Union Marine Insurance Co.* (1) the exception of perils of the seas was expressed, yet because the delay caused by the stranding was unreasonable in duration the adventure was held to be frustrated. In *Tamplin Steamship Co.'s Case* (2) Lord Parker of Waddington does not deny, he admits, the doctrine of frustration; he merely declines to apply it to the facts of that case. There the facts were widely different from those in the present cases. There was a time charter of five years, of which time there was still nearly one-third unexpired when the judgment in the House of Lords was delivered; in which the charterer was ready and willing to continue to pay the hire, and in which the British Government, who were imposing the restraint, were ready and willing to pay both owner and charterer according to their respective interests. I think that case cannot govern these cases. It is to be observed that in *Hadley* v. *Clarke* (3) the exception is stated to be "the dangers of the seas only excepted." There appears to have been no exception of restraint of princes, and therefore nothing to cover "embargo." The shipowner's promise to carry thus stood as an absolute promise, and there was no finding in the special case that the adventure had been frustrated. This case, therefore, is not an authority against the view I have stated.

I think the findings of fact in these cases, taken with the great

(1) L. R. 10 C. P. 125. (2) [1916] 2 A. C. 397.
(3) 8 T. R. 259.

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lapse of time that has occurred, show that in each the "adventure" was "frustrated" and the contract at an end.

The appeals should be allowed.

Appeals allowed.

Solicitors in first case: *Lowless & Co., for plaintiffs; Maples, Teesdale & Co., for Bramwell, Bell & Clayton, Newcastle-upon-Tyne, for defendants.*

Solicitors in second case: *Botterell & Roche, for Botterell, Roche & Temperley, Newcastle-upon-Tyne, for shipowners; Thomas Cooper & Co., for Dixon Jacks, Newcastle-upon-Tyne, for charterers.*

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[IN THE COURT OF APPEAL.]

BLANE *v.* FRANCIS.

Landlord and Tenant—Lease—Tenant holding over after Expiration of Term—Tenancy from Year to Year—No Agreement in Writing—Assignee of Reversion—Right to sue on Covenants in Lease—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 10.

By s. 10 of the Conveyancing Act, 1881, "Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessees part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased":—

Held, that the section does not apply to a lease which is not in writing.

Where, therefore, the tenant of a house for a term under a lease by deed containing a covenant to repair held over after the expiration of the term, no further document being signed, as tenant from year to year upon the terms of the expired lease so far as they were applicable to such a tenancy, and the reversion was subsequently assigned:—

Held, that the assignee of the reversion was not entitled to sue

the tenant for breaches of the express covenant to repair contained in the expired lease; nor was he entitled to demand that the tenant should execute a lease so as to enable him to sue upon the covenant.

APPEAL from the judgment of a Divisional Court (Darling and Lord Coleridge JJ.) reversing the judgment of the judge of the county court of Hampshire holden at Andover.

By an indenture dated February 10, 1892, F. Harington and E. M. Harington leased to J. T. Francis three cottages with the land attached thereto for the term of seven years from March 25, 1892, at the yearly rent of 14*l.* payable half-yearly on September 29 and March 25 in each year; and the lessee "agrees to keep the aforesaid property in good tenantable repair during the term of seven years and every year also at the expiration of this lease to leave the aforesaid property in thorough repair."

The term of seven years expired on March 25, 1899, and the lessee remained in possession of the cottages and land as tenant from year to year, and paid rent at the rate of 14*l.* a year, until his death on February 15, 1905. The defendant, who was his widow and legal personal representative, then went into possession of the cottages and land and remained in possession, paying the rent until the tenancy was determined by the lessors giving to her six months' notice to quit expiring on March 25, 1915. By indenture dated November 12, 1914, the lessors conveyed the fee simple of two of the cottages to the plaintiff, Mrs. Blane. The defendant paid to the plaintiff the half-year's rent due in respect of the two cottages on March 25, 1915, when she gave up possession.

The plaintiff brought this action in the county court claiming damages for breach of the covenants in the lease of February 10, 1892, to keep and deliver up the cottages in repair.

By agreement the issue in the case was stated to be, Whether the defendant, having held over after the expiration of the original lease, was liable to the plaintiff as assignee of the reversion on the repairing covenants contained in the lease, the question of amount standing over until the question of liability was determined.

It was agreed that the lease of February 10, 189 was granted by the plaintiff's predecessor in title to the defendant's predecessor in title for seven years, and that the defendant at all material times

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held over on such terms of the said lease as were applicable to a yearly tenancy.

The county court judge gave judgment for the plaintiff. The Divisional Court entered judgment for the defendant. The plaintiff by leave appealed.

Ricketts, for the plaintiff. The defendant's yearly tenancy not being under seal, the statute 32 Hen. 8, c. 34, does not enable the plaintiff as assignee of the reversion to sue upon the covenants in the original lease. But s. 10 of the Conveyancing Act, 1881, enables the pla ntiff to sue. The word "lease" does not in law import a written instrument: *Bridgland* v. *Shapter* (1): Sheppard's Touchstone, 8th ed., p. 267. The new tenancy created by the holding over "was in fact a new contract and a new demise": per Willes J. in *Oakley* v. *Monck*. (2) The word "demise" means a lease, which may or may not be in writing. There is nothing in either s. 10 or s. 11 to confine "lease" to a written instrument. In Blackstone's Commentaries, 21st ed., vol. 2, p. 317, a lease is said to be "properly a conveyance of any lands or tenements," but the word "conveyance" is used in a wide sense, and is not confined to a written instrument. Sect. 18 of the Act may appear to refer to a lease under a deed or other instrument in writing, sub-s. 8, for instance, speaking of a "counterpart of every such lease"; but to correct that view, and to bring the section into line with the other sections, sub-s. 17 provides that the section shall extend and apply to any letting whether in writing or not. This point was not decided in *Wedd* v. *Porter*. (3) [*Manchester Brewery Co.* v. *Coombs* (4) was also referred to.]

If s. 10 of the Conveyancing Act, 1881, does not apply, the defendant was in possession of land as a yearly tenant under a verbal agreement upon the terms of the old lease so far as they were applicable to a yearly tenancy, and in such a case a term is to be implied in the agreement that both parties will execute a deed or instrument in writing if that is required to place them on the footing intended. One of the incidents of the old lease was that the lessors could convey the reversion to a purchaser so as to enable

(1) (1839) 5 M. & W. 375, 381.
(2) (1866) L. R. 1 Ex. 159, 164.
(3) [1916] 2 K. B. 91, 100.
(4) [1901] 2 Ch. 608, 619.

him to sue in his own name for breaches of the covenants in the lease. The parties cannot be put into that position unless the plaintiff can obtain a decree of specific performance to compel the defendant to execute a deed or instrument in writing. The principle in *Wilson* v. *West Hartlepool Ry. Co.* (1) applies : see Fry on Specific Performance, 5th ed., s. 837. The Court will decree specific performance of an agreement for a tenancy from year to year : *Lever* v. *Koffler* (2) (explaining *Clayton* v. *Illingworth* (3)) ; *De Brassac* v. *Martyn*. (4) That being so, the case must be looked at as if specific performance had been decreed : *Manchester Brewery Co.* v. *Coombs* (5) ; and the plaintiff can sue the defendant upon the covenants to repair in the original lease. [*Johnson* v. *Churchwardens of St. Peter, Hereford* (6) was also referred to.]

F. J. Tucker, for the defendant, was not called upon.

SWINFEN EADY L.J. This is an appeal from the judgment of a Divisional Court allowing an appeal from a county court. The action is brought to recover damages for breach of covenant to repair two cottages. In February, 1892, a deed was executed whereby three cottages were leased to Francis for a term of seven years from March 25 at the yearly rent of 14*l.* payable half-yearly. The lessee remained in possession under the lease for the seven years, and then held over and continued as yearly tenant for nearly six years until his death in February, 1905. The defendant, his widow, went into possession, if not of all the cottages, at any rate of the two comprised in the subsequent conveyance to the plaintiff. She remained in possession until the tenancy was determined by six months' notice to quit expiring on March 25, 1915. The plaintiff in November, 1914, purchased the reversion of the two cottages in question. At the date of the plaintiff's purchase notice had been given determining the tenancy on the following Lady Day. The tenancy was accordingly determined, and proceedings were commenced in the county court by the plaintiff as assignee of the reversion claiming to recover against the defendant damages for breaches of the repairing covenants

(1) (1865) 2 D. J. & S. 475, 495.
(2) [1901] 1 Ch. 543.
(3) (1853) 10 Hare, 451.
(4) (1863) 11 W. R. 1020.
(5) [1901] 2 Ch. 617, 618.
(6) (1836) 4 Ad. & E. 520.

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contained in the lease of 1892. The position, therefore, in the county court was that the plaintiff as assignee of the reversion claimed against the defendant as being bound by the covenants in the original lease so far as they were applicable to a yearly tenancy. The parties have signed certain admissions. [The Lord Justice read those set out above.] The question is left open, and has not been argued, whether the covenant to yield up in repair at the end of the term is applicable to the yearly tenancy. In the view we take of the case that question does not arise.

The plaintiff's case is put in two ways. In the first place it is said that the plaintiff as assignee of the reversion expectant on the determination of the yearly tenancy is entitled to sue upon the covenants in the lease so far as they are applicable to the yearly tenancy. In the second place it is said that, if the plaintiff is wrong in that, the circumstances entitle her to bring an action for specific performance to compel the defendant to execute a lease for a yearly tenancy upon the terms of the expired lease so far as they are applicable to such a tenancy. That is to say, that as the original tenancy was under a lease, if the defendant held upon the terms of that lease, it would involve the execution of a lease. Dealing with this latter contention first, I cannot agree with it. The agreement between the landlord and the tenant implied from the holding over was for a yearly tenancy on the terms of the original lease, so far as applicable, without any right on the part of either to demand anything further. I fail to see any ground upon which either the landlord or the tenant could compel the other to execute a lease putting those terms into writing. Neither party had agreed to do so. It is sufficient to say that, when the parties are in such a position as that just described, there is no legal obligation on either to execute any instrument. The case of *Clayton* v. *Illingworth* (1) is authority for that proposition, if authority be needed.

I now come to the first contention. The plaintiff says that there is a lease which need not be by deed or in writing, the defendant being in the position of lessee. If the plaintiff were the assignee of the reversion expectant on the determination of a lease under seal, the Act 32 Hen. 8, c. 34, would enable him to sue. There is, however, no lease under seal; but the contention is that the case is within

(1) 10 Hare, 451.

s. 10 of the Conveyancing Act, 1881. In my opinion that section does not apply. I am satisfied that the language of s. 10—which speaks of "rent reserved by a lease" of "every covenant or provision therein contained, having reference to the subject-matter thereof," and of "every condition of re-entry and other condition therein contained"—is not applicable to an agreement not in writing. Therefore the case is not brought within s. 10. I agree with what Farwell J. said upon this in *Manchester Brewery Co.* v. *Coombs*. (1) This point was kept open in *Wedd* v. *Porter*. (2) The decision in that case shows that, apart from s. 10 of the Conveyancing Act, 1881, the plaintiff cannot bring herself into a position so as to hold the defendant liable to her on the express covenants in the original lease. The defendant has paid into Court a small sum to cover her liability under the covenants implied by law upon the holding over, namely, to keep the buildings wind and water tight, and that sum is accepted by the plaintiff as sufficient. The judgment for the defendant is right and the appeal fails.

BANKES L.J. I agree. In the action the plaintiff claimed damages for breach of covenants to repair. The plaintiff contends that she is entitled to sue upon the express covenants contained in the lease of 1892. The defendant has paid a small sum into Court, and the plaintiff does not dispute that it is sufficient to cover any liability for breaches which have occurred since the date of the assignment to the plaintiff in November, 1914, of any implied covenants. Therefore the only question is whether the plaintiff can sue on the express covenants contained in the original lease. Two points are made on behalf of the plaintiff. First, it is said that the case falls within s. 10 of the Conveyancing Act, 1881. There has been no decision expressly in point as to whether an agreement not in writing comes within that section, though Farwell J. in *Manchester Brewery Co.* v. *Coombs* (1) expresses an opinion that the section does not apply to such an agreement. In my opinion the language of s. 10 is appropriate, and appropriate only, to an instrument in writing. This view of the section is confirmed by the provisions of s. 18, sub-s. 17, which deals with the question as to whether the word "lease" in

(1) [1901] 2 Ch. 619. (2) [1916] 2 K. B. 100.

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that section extends beyond a lease by deed or instrument in writing, and it enacts that "the provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting." The fact that no such provision is to be found in s. 10 confirms my view.

The second point is that, if this is not a lease within s. 10, the plaintiff is in a position to demand a lease by process of obtaining a decree for specific performance. This argument is founded upon the assumption that the parties must have contemplated a lease being signed when the original lease came to an end by effluxion of time and the relation of the parties as landlord and tenant continued, because the law implies a holding on the terms of the old lease; and it is said that that cannot be so unless a lease is granted, and that therefore there is an obligation on the tenant to execute a lease if demanded. I do not agree with that contention as a matter of law, and if the question is to be decided as an inference of fact I see no evidence that either the landlord or tenant desired or intended that there should be a written agreement to regulate their position. They were content to rest their position on the mere fact of holding over. Upon these grounds in my opinion the appeal fails.

LAWRENCE J. I am of the same opinion. I do not wish to add anything upon the question whether there can be implied a promise by the tenant to execute a new lease. I do not think that the parties contemplated that there should be a document containing the provisions of the old lease so far as they were applicable to the yearly tenancy.

With regard to the other point, as to which I have felt some doubt, whether the case comes within s. 10 of the Conveyancing Act, 1881, I have come to the conclusion that it does not. The language of the section does not seem appropriate to a parol tenancy. The section speaks of every covenant or provision "therein contained," and these last words are repeated later in the section, and point naturally to a document under seal or in writing. They are not appropriate to an unwritten agreement. For these reasons, although I should like to read the section as including a parol

tenancy created by holding over and paying rent after the expiration of a lease in writing, the words of the section do not allow it.

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Appeal dismissed.

Solicitors for plaintiff: *Mackrell, Maton, Godlee & Quincey, for P. E. J. Talbot, Andover.*

Solicitors for defendant: *Peacock & Goddard, for T. E. Longman, Andover.*

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[IN THE COURT OF APPEAL.]

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THE KING *v.* THE GENERAL COMMISSIONERS OF INCOME TAX FOR SOUTHAMPTON.

Ex parte W. M. SINGER.

Revenue—Income Tax—Profits arising from Foreign Possessions—Place of Assessment—Jurisdiction of Commissioners at Place of Residence—Retrospective Effect of Legislation—"Charge" to Income Tax—Assessment of Additional Commissioners—Confirmation by General Commissioners—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 108—*Taxes Management Act*, 1880 (43 & 44 *Vict. c.* 19), *s.* 82—*Finance* (*No.* 2) *Act*, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 32.

By s. 32 of the Finance (No. 2) Act, 1915, which came into force on December 23, 1915, it is enacted that, "(1.) Notwithstanding anything in section one hundred and six or one hundred and forty-six of the Income Tax Act, 1842, or in any other enactment relating to income tax, a person may be charged to income tax under Schedule D or E, ... by commissioners acting for any parish or place in which that person ordinarily resides; and if any person has been so charged before the commencement of this Act, the charge shall not be deemed invalid by reason of that person not having been charged by the right commissioners. (2.) Section one hundred and eight of the Income Tax Act, 1842, (which makes provision as to the place at which persons are to be assessed to income tax in respect of profits or gains arising from foreign and colonial possessions or securities) is hereby repealed."

On March 30, 1915, an additional assessment to income tax was made upon S. by the additional Commissioners for the district in which he resided in respect of dividends received by him in England from an American company. Notice of the assessment was given

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to S. on October 19, 1915, and on October 26 he obtained a rule nisi to prohibit the General Commissioners for the district from proceeding upon the assessment on the ground that by s. 108 of the Income Tax Act, 1842, the assessment could only be made by the Commissioners for Bristol, that being the nearest of the four places mentioned in s. 108 to the place where S. resided. Cause was shown against the rule on January 13, 1916:—

Held, (1.) (affirming the decision of the Divisional Court [1916] 2 K. B. 249), that sub-s. 1 of s. 32 of the Finance (No. 2) Act, 1915, applied to the case of an assessment made under s. 108; that the retrospective effect of the section extended to proceedings for a prohibition commenced before the Act came into force; and that the charge to income tax, if effectively created, must be deemed to have been made by the right Commissioners;

But *held*, (2.) (reversing the decision of the Divisional Court), that, inasmuch as the assessment made upon S. by the additional Commissioners had not been allowed or confirmed by the General Commissioners, he had not been effectively "charged" to income tax within s. 32, sub-s. 1, and the retrospective effect of the section had not therefore been brought into operation.

Held, therefore, that the rule nisi for a prohibition must be made absolute.

APPEAL from a decision of the Divisional Court (Lord Reading C.J., Sankey J., and Low J.) (1) discharging a rule nisi for a writ of prohibition directed to the General Commissioners for Income Tax for the district of Southampton prohibiting them from proceeding upon an assessment to income tax made upon Washington Singer, of Norman Court, Tytherley, Hampshire, in respect of profits on foreign possessions for the year ending April 5, 1912.

The rule nisi had been granted on the ground (inter alia) that all assessments in respect of profits arising from foreign possessions must, by s. 108 of the Income Tax Act, 1842, be made by the Commissioners for the purposes of the Income Tax Acts acting for the respective places London, Bristol, Liverpool, and Glasgow according to the regulations of the said Acts, and no such assessments can be made by Commissioners acting for any other place.

The rule nisi should have been directed to the General Commissioners and the surveyor of taxes for the district of Romsey, and not Southampton, but by agreement the case was dealt with as if the right parties had been made respondents.

The rule nisi was obtained on October 26, 1915, and cause was

(1) [1916] 2 K. B. 249.

shown against it on January 13, 1916. The Finance (No. 2) Act, 1915 (1), came into force on December 23, 1915.

The Divisional Court held that s. 32, sub-s. 1, applied to the case of an assessment made under s. 108 of the Act of 1842, that the retrospective effect of s. 32 applied to the present case although the proceedings for prohibition had been commenced before the Act came into force, and that the assessment must therefore be deemed to have been made by the right Commissioners. They therefore discharged the rule. Against that decision Washington Singer now appealed.

Sir R. Finlay, K.C., and *Edwardes Jones*, for the appellant. First, we submit that the retrospective effect of s. 32 of the Act 5 & 6 Geo. 5, c. 89, is limited to assessments under ss. 106 and 146 of the Act of 1842, and cannot be extended to assessments under s. 108. Sects. 106 and 146 alone are mentioned in s. 32 to the exclusion of s. 108, the inference being irresistible that s. 108 is not affected. The following authorities show what care should be exercised in defining the scope of retrospective legislation :— *Hitchcock* v. *Way* (2) ; *Moon* v. *Durden* (3) ; *Wright* v. *Hale* (4) ; *In re Joseph Suche & Co.* (5) ; *Lauri* v. *Renad* (6) ; *The Ydun* (7) ;

(1) Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), s. 32 :

" (1.) Notwithstanding anything in section one hundred and six or one hundred and forty-six of the Income Tax Act, 1842, or in any other enactment relating to income tax, a person may be charged to income tax under Schedule D or E, whether or not he is engaged in any trade, manufacture, adventure, or concern, or any employment, vocation, or office, by commissioners acting for any parish or place in which that person ordinarily resides ; and if any person has been so charged before the commencement of this Act, the charge shall not be deemed invalid by reason of that person not having been charged by the right commissioners :

" Provided that nothing in this section shall affect the operation of section one hundred and seventy-one of the Income Tax Act, 1842, with respect to double assessments.

" (2.) Section one hundred and eight of the Income Tax Act, 1842, (which makes provision as to the place at which persons are to be assessed to income tax in respect of profits or gains arising from foreign and colonial possessions or securities) is hereby repealed."

(2) (1837) 6 Ad. & E. 943.

(3) (1848) 2 Ex. 22, 42.

(4) (1860) 6 H. & N. 227.

(5) (1875) 1 Ch. D. 48.

(6) [1892] 3 Ch. 402, 421.

(7) [1899] P. 236, 245.

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Colonial Sugar Refining Co. v. *Irving.* (1) Sect. 108 was law until the date of its repeal, namely, December 23, 1915, and, that being so, it cannot rightly be said that s. 32, sub-s.1, of the Act of George V. had any retrospective effect upon it. Sect. 32 was enacted for the purpose of obviating the result of the construction put upon s. 106 by the House of Lords in *Kensington Income Tax Commissioners* v. *Aramayo.* (2)

Secondly, assuming that our first contention is wrong, we submit that in this case there has been no " charge " to income tax which can be retrospectively validated by the operation of s. 32, sub-s. 1. The word " charged " in the earlier part of the sub-section must refer to the completed charge. The assessment by the additional Commissioners does not become a " charge " until it has been allowed or confirmed by the General Commissioners. To extend the operation of the sub-section to a mere preliminary assessment by the additional Commissioners would be contrary to the principles according to which the Courts construe Acts retrospectively. The word " charged " in s. 32, sub-s. 1, which was enacted after the decision of the House of Lords in the *Aramayo Case* (2), must be taken to have the meaning there put upon it, namely, the completed process by which the liability is imposed. [They also referred to the Income Tax Act, 1842, ss. 4, 16, 111—120, 122, and 126, and to the Taxes Management Act, 1880, ss. 52, 56, and 57.]

Sir George Cave, S.-G., and *T. H. Parr* (for *Raymond Asquith*, lately serving with His Majesty's Forces), for the Crown. The effect of the decision in *Aramayo's Case* (2) was, no doubt, that the only persons entitled to make an additional first assessment upon the appellant in respect of profits arising from foreign possessions were the Commissioners acting under s. 108 of the Act of 1842, but s. 32 of the Finance (No. 2) Act, 1915, is retrospective in operation and has the effect of validating the additional first assessment in question. Sect. 32 is a clear enactment, and there is nothing to cut down its retrospective operation: *Pardo* v. *Bingham* (3); *West* v. *Gwynne* (4); *Dibb* v. *Walker.* (5) The fact that the pro-

(1) [1905] A. C. 369, 372.
(2) [1916] 1 A. C. 215.
(3) (1869) L. R. 4 Ch. 735.
(4) [1911] 2 Ch. 1.
(5) [1893] 2 Ch. 429.

ceedings for a prohibition were commenced before the passing of the Act is immaterial: *Attorney-General* v. *Theobald* (1); *Hurst* v. *Hurst.* (2) The retrospective effect of a statute may apply to legal proceedings which are pending at the date of its passing.

The suggestion that an "assessment" is not a "charge" within the meaning of s. 32 cannot be supported. The word "charge" is frequently used in connection with the acts of the additional Commissioners both in the Act of 1842 (see ss. 111 and 116) and in the Taxes Management Act, 1880, ss. 52, 55, 56, and 57. The effect of s. 32 of the Act of 1915 is to validate the assessments made by the additional Commissioners as well as the confirmation thereof by the General Commissioners. Lord Wrenbury in the *Aramayo Case* (3) points out that "it is not possible to rest any conclusion upon a particular word. The same word is in one section used in one sense and in another in a different sense." The word "charge" in s. 32 includes what may be called the quasi-charge made by the additional Commissioners. The object of the section was to remove a technical objection, and the word "charge" should be construed in its wider sense.

Bremner, for the General Commissioners for Romsey. For the purposes of the Income Tax Acts an assessment is treated as a charge: Income Tax Act, 1842, ss. 111, 113, 114, and 116; Taxes Management Act, 1880, s. 82, sub-s. 3. In s. 32 of the Act of 1842 "Commissioners" includes both additional and General Commissioners. Sect. 27, sub-s. 2, and s. 28, sub-s. 5, show that when it is necessary to specify one set of Commissioners only it is done so in terms. Sects. 114, 116, and 117 speak of the party or parties charged by additional Commissioners, showing that the charge is effected by them and that the allowance or confirmation by the General Commissioners is merely formal. No doubt where the assessment of the additional Commissioners is appealed against there is no binding assessment until it has been confirmed by the decision of the General Commissioners: see ss. 122 and 123, and the Taxes Management Act, 1880, s. 57, sub-s. 4. But where there is no appeal a charge is created by the assessment of the additional Commissioners. It

(1) (1890) 24 Q. B. D. 557. (2) (1882) 21 Ch. D. 278.
(3) [1916] 1 A. C. 215.

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cannot be that s. 32 was not intended to entirely get rid of the difficulty caused by the decision in the *Aramayo Case.* (1)

Sir R. Finlay, K.C., in reply.

Cur. adv. vult.

Nov. 6. LORD COZENS-HARDY M.R. This is an appeal from an order of the Divisional Court discharging a rule nisi for a prohibition, and it raises a curious point under s. 32 of the Finance (No. 2) Act, 1915. It had been for many years the practice for Commissioners to assess the duty in respect of profits arising from foreign possessions under s. 106 of the Act of 1842, but on July 28, 1915, it was held by the House of Lords in *Kensington Income Tax Commissioners* v. *Aramayo* (1) that the only section applicable to such a case is s. 108 of the Act of 1842, and that such duty must be assessed in London, Bristol, Liverpool, or Glasgow. No such assessment can be made by Commissioners acting in any other place. On March 30, 1915, an additional first assessment was made upon Singer by additional Commissioners for the district of Romsey, in which he was ordinarily resident, in respect of profits arising from foreign securities for the income tax year 1911-1912. On October 26 a rule nisi for a prohibition was obtained on the ground that the Romsey additional Commissioners had no jurisdiction. It is not disputed that, having regard to the *Aramayo Case* (1), if nothing else had happened, the rule for a prohibition must have been made absolute; but on December 23, 1915, the Finance (No. 2) Act, 1915, was passed, and s. 32, which was undoubtedly enacted in consequence of the *Aramayo Case* (1), is said to have altered the whole position, and it is argued that the rule nisi for a prohibition ought to be discharged, and the Divisional Court have taken this view.

We have had the advantage of an elaborate argument upon many sections of the Act of 1842 and the Act of 1880; but, without attempting to go through the whole of the sections referred to, I think it will be sufficient to state the conclusion at which I have arrived having regard to the recent decision in the House of Lords. The machinery under which income tax under Sched. D is levied involves certain acts to be done by two sets of Commissioners,

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first, the additional Commissioners, and next the General Commissioners. No Crown debt exists until the assessment made by the additional Commissioners has been allowed and confirmed by the General Commissioners: see s. 82 of the Act of 1880. The additional Commissioners alone cannot create a charge. It is only the General Commissioners who can impose a liability upon the taxpayer or create an effective charge. In the language of Lord Wrenbury at p. 228, the Act contemplates throughout only one tribunal which can affect the taxpayer with liability, and that tribunal is the General Commissioners.

Although the decision in *Aramayo's Case* (1) turned upon s. 108, the reasons given clearly affected s. 106. Parliament thought right to enact that, notwithstanding anything in s. 106, which applies to Sched. D, or s. 146, which applies to Sched. E, a person may be charged to income tax under Sched. D or E, whether or not he is engaged in any trade, manufacture, adventure, or concern, by Commissioners acting for any parish or parishes where that person ordinarily resides. The first sub-section of s. 32 deals expressly with those two sections alone and does not mention s. 108. It is contended on behalf of the Crown that the general words in sub-s. 1, "or in any other enactment relating to income tax," are sufficient to apply to income tax on foreign possessions, and that the latter portion of sub-s. 1, which is clearly retrospective to some extent, applies also to income tax on foreign possessions. I have felt considerable doubt, which is not entirely removed, upon this point. But upon the whole I think the argument of the Crown ought to prevail. Income tax under Sched. D is not charged on profits or gains arising from foreign possessions by virtue of s. 108, but by virtue of s. 100. Sect. 108 only makes an exception as to the persons who are to assess the duty. It is an exception from the general provisions in s. 106. This exception is removed by the repeal in the second sub-section of s. 32 of s. 108 of the Act of 1842. The assessment must in future be made under s. 106 as amended by sub-s. 1 of s. 32, that is to say, in Singer's case, by additional Commissioners in his place of residence. The retrospective part of the sub-section would apply to give validity to a charge created before December 23, 1915, by the wrong Commissioners. I arrive at this conclusion in

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spite of the absence of any express reference to profits and gains from foreign possessions.

Thus far I agree with the Divisional Court in their decision in favour of the Crown. But in the present case I think there is nothing upon which the sub-section can operate. The latter portion of the sub-section deals only with a case where before December 23 a person has been fully and effectively "charged," that is to say, charged by the combined action of the additional Commissioners and the General Commissioners, and that event has not happened in the present case. There is no doubt that the words "may be charged to income tax" in the first portion of the sub-section mean completely charged, and I think the words "so charged" in the latter part of the sub-section must have the same meaning. In my opinion the event has not happened which could bring the retrospective words of s. 32 into operation.

The conclusion at which I have arrived will not lead to the disastrous results which have been suggested. In the present case it will not be possible to assess Singer for the year 1911-1912 because of the time limit imposed by s. 23, sub-s. 2, of the Finance Act, 1907. But as to any subsequent years an additional first assessment may be made by additional Commissioners acting for any parish in which Singer "ordinarily resides," and such first assessment may be allowed and confirmed by the General Commissioners. I express no opinion as to what the result may be if Singer should be held not to have any "ordinary residence."

The appeal must be allowed, with costs here and below.

BANKES L.J. On March 30, 1915, the additional Commissioners of Income Tax for the division of Romsey in the county of Southampton certified an additional first assessment wherein the appellant, Washington Singer, was assessed to income tax alleged to be chargeable under Sched. D for the year ending April 5, 1912, in respect of profits or gains arising from foreign possessions. On October 26, 1915, the Divisional Court granted a rule nisi directed to the General Commissioners for the district of Southampton calling upon them to show cause why a writ of prohibition should not be awarded to prohibit them from allowing, confirming, making, enforcing, or otherwise proceeding on the said assessment. By mistake the rule

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was directed to the General Commissioners of Southampton, but by consent the matter was treated as though the rule had been directed to the General Commissioners for Romsey. The main ground upon which the rule was moved was that the additional Commissioners for the district of Romsey had no jurisdiction at all in the matter. The rule came on for argument and was discharged by the Divisional Court. The present appeal is from that order. The question raised is one of jurisdiction. It is conceded that, unless the law has been altered since the decision by the House of Lords of *Aramayo's Case* (1) in July, 1915, the appellant is entitled to succeed because the effect of that decision was that the only persons entitled to make an additional first assessment upon the appellant in respect of profits or gains arising from foreign possessions were the Commissioners acting under s. 108 of the Income Tax Act, 1842. It is contended, however, for the Crown that not only has the law been altered by the Finance (No. 2) Act, 1915, in reference to assessments to be made after the coming into operation of that Act, but that the Act in terms renders valid the additional first assessment in question, even though it was certified by the wrong set of Commissioners. The section which is said to have this effect is s. 32 of that Act. The question for our decision resolves itself into a question of the proper construction of that section, and indeed of very few words in that section. Everything turns upon the meaning of the words "charged to income tax under Schedule D . . . . by commissioners acting for any parish or place in which that person ordinarily resides" as used in that section. In considering that question it is, however, of course necessary to consider the context in which the words are used, and the provisions of the Income Tax Acts generally which indicate the steps to be followed in creating a charge to income tax. The Finance (No. 2) Act, 1915, was passed on December 22, 1915, that is, after the decision of the House of Lords in *Aramayo's Case* (1), and came into force immediately. Sect. 32 is divided into two sub-sections, the second of which simply repeals s. 108 of the Income Tax Act, 1842, as from the date of the passing of the Act and presents no difficulty. The first sub-section is the one upon the construction of which the whole question turns. It says: "Notwithstanding any-

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thing in section 106 or 146 of the Income Tax Act, 1842, or in any other enactment relating to income tax, a person may be charged to income tax under Schedule D or E, whether or not he is engaged in any trade, manufacture, adventure, or concern, or any employment, vocation, or office, by commissioners acting for any parish or place in which that person ordinarily resides; and if any person has been so charged before the commencement of this Act, the charge shall not be deemed invalid by reason of that person not having been charged by the right commissioners: Provided that nothing in this section shall affect the operation of section 171 of the Income Tax Act, 1842, with respect to double assessments." The first point taken for the appellant is that the last branch of the first sub-section has no application at all to the present case, or to any case to which s. 108 of the Income Tax Act, 1842, applied. The argument was founded mainly upon the fact that in the first branch of the sub-section no reference is made to s. 108, though ss. 106 and 146 are specifically mentioned. I do not agree with this argument. In my opinion the words " or in any other enactment relating to income tax " include s. 108 and are just as effective for this purpose as if s. 108 had been specifically mentioned. I agree with the view of the drafting of the sub-section suggested by the Solicitor-General, that the draftsman, having regard to the repeal of s. 108 in the immediately following sub-section, would naturally desire to avoid specifically mentioning it in the sub-section he was drafting unless it was absolutely necessary so to do.

The other argument advanced for the appellant requires much more detailed consideration. It is said that the action of the additional Commissioners for the district of Romsey did not amount to a " charge to income tax " within the meaning of sub-s. 1 of s. 32, and that consequently there was no charge before the commencement of the Act to which the retrospective action of the sub-section could apply. In my opinion this argument is well founded. Prima facie it would appear unlikely that the Legislature would desire to protect and render valid any proceedings which were, so to speak, " sub judice," or any proceedings other than those which had arrived at their final and concluded stage. An examination of the statutes confirms this prima facie view, even if the point is not

already put beyond discussion by the decision in *Aramayo's Case.* (1) Assuming that the point is not decided by that case, it is, I think, important to concentrate attention on those provisions of the Income Tax Acts which deal with Scheds. D and E, because the procedure with regard to Scheds. A and B is very different from that under Scheds. D and E, and terms which are appropriate to the one procedure are inapplicable to the other. It is not, I think, necessary to draw attention to the sections relating to the General and to the additional Commissioners, and which draw the distinction between the two sets of persons and between their respective duties, because it is conceded on behalf of the Crown that the two bodies are quite distinct and have quite separate and independent duties. The first material section I need refer to is s. 106, which deals with the districts in which the duties under Sched. D are to be charged. This section divides the community for this purpose into four classes—the householder, the business or professional person, the resident, and the person who does not come under any of the above descriptions. The combined effect of this section and of s. 32, sub-s. 1, of the Finance (No. 2) Act, 1915, coupled with the repeal of s. 108 of the Act of 1842, is that from and after the coming into force of the Finance (No. 2) Act, 1915, the Commissioners acting for a parish or place where a person resides have the option of charging that person to income tax under Sched. D notwithstanding he may be a householder or carrying on a business or profession in some other parish or place, or that the profits or gains in respect of which he is to be assessed arise from foreign possessions. Stated in full in this way, the reason why the draftsman should have hesitated to introduce any mention of s. 108 in the first sub-section of s. 32 of the Finance (No. 2) Act, 1915, becomes clear. It will be noticed that s. 106 speaks of a charge by the Commissioners, and in dealing with the case of the resident directs that he "shall be charged by the commissioners acting for the parish or place where he shall ordinarily reside." These words are exactly reproduced in sub-s. 1 of s. 32 of the Finance (No. 2) Act, 1915, and they must, in my opinion, have the same meaning given to them in both sections.

Sect. 111 of the Act of 1842 is the section which introduces the group of sections dealing with the powers and duties of the additional

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Commissioners. It will be noticed that the jurisdiction of these Commissioners rests on the requirement that all statements of gains or profits described in Sched. D (with certain exceptions not material to this case) must be laid before the additional Commissioners. It follows, therefore, that any direction that a person shall be charged by the Commissioners must, if that expression includes the General Commissioners, involve the matter going before the additional Commissioners in the first instance. What the additional Commissioners are required by the group of sections 111 to 117 to do is to direct an assessment to be made and to cause certificates of assessments to be duly made from time to time as the same shall be completed. I think that in this group of sections, when looked into carefully, a distinction is drawn between a charge on any individual "by an assessment made by the additional Commissioners," which, as I shall point out directly, has no force in itself, "a charge by the Commissioners" (s. 111), or "a charge by virtue of the Act" (s. 113). It is not necessary to go through the sections in detail for the purpose of showing that the assessment by the additional Commissioners has no force of itself, but must be confirmed and adopted by the General Commissioners before it becomes an enforceable charge, as this is conceded by the Crown: but I may in passing mention s. 136 of the Act of 1842, and s. 82 of the Act of 1880 and Form No. 4 to the schedule to that Act as bearing on this point. Mr. Bremner, for the Commissioners, insisted that the expression "commissioners" as used in s. 32 of the Finance (No. 2) Act, 1915, must include the additional Commissioners. I agree to that contention, but it does not conclude the point which we have to decide, which is whether the expression "charged by the Commissioners," though including the charge by assessment by the additional Commissioners, excludes the subsequent action of the General Commissioners, without which no enforceable charge can be created. In my opinion it does not, and in the result, if the matter is one upon which, after the decision in *Aramayo's Case* (1) in the House of Lords, I am at liberty to express an independent opinion, a consideration of the statutes brings me to the conclusion that what the Legislature was dealing with when enacting s. 32 of the Finance (No. 2) Act, 1915, was the result of the completed

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statutory action of both sets of Commissioners, and not of the additional Commissioners only as contended for by the Crown. The result of this decision is that the appeal must be allowed and the rule for a prohibition made absolute. It is quite correct, as pointed out by the counsel for the Crown, that, owing to the time limit imposed by s. 52 of the Taxes Management Act of 1880 as amended by s. 23 of the Finance Act, 1907, having expired, it is not possible in this case to cure the mistake and make a fresh additional first assessment upon the appellant by the proper body of additional Commissioners; but that is not a matter to be taken into consideration when dealing with the construction of the statute.

For these reasons the appeal, in my opinion, succeeds, and the rule for prohibition must be made absolute.

WARRINGTON L.J. The appellant in this case obtained a rule nisi against General Commissioners for the purposes of the Income Tax Acts for a writ of probibition against allowing, confirming, making, enforcing, or otherwise proceeding upon a certain assessment made by additional Commissioners in respect of profits from foreign possessions. This rule was discharged by the Divisional Court, and the applicant for the writ appeals.

The Commissioners in the case were those acting for the place in which it was alleged that the taxpayer ordinarily resided.

There was no dispute that Washington Singer did in fact ordinarily reside in the Commissioners' district.

The question in the case is therefore whether in respect of profits from foreign possessions the additional Commissioners for the place of residence had jurisdiction to make the assessment in question, and if they had not, then whether the defect was cured by the retrospective provision of s. 32 of the Finance (No. 2) Act, 1915.

Washington Singer during the financial year 1911-1912 was in receipt of large profits from a business carried on in the United States of America. He made no return of these profits, and on March 30, 1915, the additional Commissioners for the division of Romsey in the county of Southampton, pursuant to s. 52 of the Taxes Management Act, 1880, made an additional first assessment upon him in the sum of 160,000*l.* in respect of his profits from foreign possessions for the financial year aforesaid. This assessment

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was made within the time limited by the statute under which it was made, as amended by s. 23 of the Finance Act, 1907.

Washington Singer was not engaged in any trade, manufacture, adventure, or concern, or any profession, employment, or vocation, in the United Kingdom.

On July 28, 1915, judgment was delivered in the House of Lords in *Aramayo's Case*. (1) It was clear as the result of this judgment that the only Commissioners who had jurisdiction to make an assessment against Washington Singer in respect of his foreign profits were the Commissioners acting for the city of Bristol, being one of the four places mentioned in s. 108 of the Income Tax Act, 1842.

The rule was obtained on October 26, 1915, and was made returnable on November 6, 1915. If it had been argued on that day it must have been made absolute.

On December 23, the Royal assent was given to the Finance (No. 2) Act, 1915. [The Lord Justice read s. 32 of that Act and continued :]

On April 4, 1916, judgment on the argument of the rule was delivered by the Divisional Court. That Court discharged the rule on the ground that the defect in the assessment was cured by the retrospective provision of sub-s. 1 of s. 32 of the Act of 1915. The Court were of opinion, first, that the provisions of sub-s. 1 apply as well to foreign profits as to income generally under Sched. D, and, secondly, that Washington Singer had been charged in respect of such profits before the commencement of the Act within the meaning of the retrospective part of the section. The appellant challenges both these findings.

The first question is, Does the first sub-section apply at all to cases falling within s. 108 of the Income Tax Act, 1842, that is to say, to assessments to profits or gains arising from foreign possessions ?

The true construction of ss. 106 and 108 of the Income Tax Act of 1842 is settled as to s. 106 by the decision of this Court in *Aramayo's Case* (2), and as to both sections by the decision of the House of Lords in the same case. (1) The effect of the decisions as to s. 106 is that a person engaged in trade can only be assessed under

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Sched. D by Commissioners for the place where the trade is carried on, and that an assessment by Commissioners for the place of residence would be made without jurisdiction.

The House of Lords, while adopting the views of the Court of Appeal as to s. 106, went further and held that s. 108 is imperative and not optional (as the Court of Appeal thought), and is to be read as a proviso on and as creating an exception to s. 106, so that in respect of profits arising from foreign possessions the only Commissioners having jurisdiction are those of one or other of the four places mentioned in s. 108.

That being the true construction of the Act of 1842, the Act of 1915 is passed, and s. 32 deals with both the points decided in *Aramayo's Case.* (1)

The result appears to be as follows. After the commencement of the Act, by reason of the repeal of s. 108, the exception in the case of foreign profits ceases to exist. Therefore from and after the same date a man may be charged by Commissioners acting for his place of residence as well in respect of foreign profits as of other income under Sched. D, and if a person has been so charged before the commencement of the Act the charge is not to be deemed invalid by reason of that person not having been charged by the right Commissioners.

If, therefore, it could upon the facts be maintained that the appellant had been charged within the meaning of the Act, he would in my opinion be precluded from objecting to the jurisdiction of the Commissioners.

But the question then arises, has he been charged within the meaning of the Act ? All that has been done is that the additional Commissioners have made an additional assessment; such assessment had not before the commencement of the Act been allowed and confirmed by the General Commissioners, and has not yet been allowed and confirmed.

We have had a most elaborate argument on the construction of the Income Tax Act, 1842, in reference to the functions of the additional and General Commissioners respectively. I do not propose to go through the various sections which have been cited and discussed, for I think this point is clearly covered by the speech

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of Lord Wrenbury in *Aramayo's Case.* (1) The result of that judgment is that under the Act the work of the additional Commissioners is subordinate and preliminary only; it is the act of the General Commissioners in allowing and confirming the assessments of the additional Commissioners, and that act alone, which imposes a liability on the taxpayer. Until that act has been performed he cannot, in my opinion, be properly said to be charged to income tax. That act had not been performed in the present case before the commencement of the Act of 1915, and necessarily there is nothing in that Act to validate the otherwise invalid assessment.

I may add that I can see no distinction in this respect between an additional first assessment and a first assessment; the former requires allowance and confirmation just as much as the latter.

On the whole I think the appeal ought to be allowed and the rule made absolute.

Appeal allowed.

Solicitors for appellant: *Church, Rendell, Bird & Co.*

Solicitor for the Crown: *Solicitor of Inland Revenue.*

Solicitors for the Commissioners: *Mawby, Mawby & Morris, for W. H. Bell, Romsey.*

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G. A. S.

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Oct. 20, 24.

Adulteration—Milk—Sample taken "in course of delivery"—Delivery by Railway—Absence of Inspector of Food and Drugs on Arrival of Milk—Interval between Milk being placed on Platform and Sample taken—Police in Control of Milk during Absence of Inspector of Food and Drugs—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Sale of Food and Drugs Act Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 3.

By s. 6 of the Sale of Food and Drugs Act, 1875, no person shall sell to the prejudice of the purchaser any article of food which is not of the nature, substance, and quality of the article demanded by the purchaser, under a penalty.

By s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879, any inspector charged with the execution of the Act may procure at the place of delivery to the purchaser any sample of any milk "in course of delivery" to the purchaser in pursuance of any contract for the sale to the purchaser of the milk:—

Held, that the question whether a sample of milk is taken by the inspector "in course of delivery" within the meaning of s. 3 of the Act of 1879 is a question of degree. If upon summary proceedings taken under s. 6 of the Act of 1875 for selling adulterated milk justices find that a sample of the milk was taken "in course of delivery," the Divisional Court cannot interfere with the finding if upon the facts it can possibly be supported in law.

The appellant sold and consigned milk to a purchaser under a contract which provided that the milk was to be delivered to the purchaser at a named railway station and that "arrival of the milk at the said railway station shall constitute delivery by the vendor to the purchaser." By direction of the respondent (an inspector of food and drugs) police officers met the train on its arrival at the railway station, took possession of a churn containing the milk as it was removed from the train, placed it upon the platform, and prevented the consignee from taking possession of it until the respondent arrived at the station about twenty minutes later. The respondent then took a sample from the churn by dipping a pint measure into it.

Upon summary proceedings taken against the appellant under s. 6 of the Act of 1875 for selling adulterated milk to the prejudice of the purchaser, the justices were of opinion that the sample was procured in "course of delivery to the purchaser" within the meaning of s. 3 of the Act of 1879:—

Held, that as upon the facts it was possible to support the finding, the Divisional Court could not interfere with it.

Case stated by justices for the petty sessional division of Neath in the county of Glamorgan.

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An information was preferred by the respondent Evans, an inspector under the Food and Drugs Acts, against the appellant Cox that he the respondent on February 15, 1916, procured at the place of delivery, to wit, at Briton Ferry in the county of Glamorgan, a sample of milk then in course of delivery to one Crocker, the consignee, in pursuance of a contract for the sale of the milk, the milk having been consigned by the appellant, and the respondent, suspecting the milk to have been sold contrary to the provisions of s. 6 of the Sale of Food and Drugs Act, 1875 (1), submitted it to be analysed, and thereupon the milk was found not to be of the nature, substance, and quality of the article demanded by the purchaser thereof in that it contained 18 per cent. of added water.

The appellant was a milk vendor carrying on business at Cardiff and purchased milk from a large number of farmers in the county of Carmarthen, which was put into a vat holding about 400 gallons at a milk factory at Carmarthen belonging to the appellant. If when the whole of the milk from the farmers had come in there proved to be a deficiency in the quantity which the appellant desired to despatch for the day, the quantity was made up by the addition of milk prepared from milk powder and water. On February 15, 1916, forty-six gallons were so added to a total of farm milk of 349 gallons, and the mixture was then tested by the Gerber test. It was then put into churns, and in the evening the appellant consigned some of the churns to a station called Port Talbot and some to another station called Briton Ferry. The respondent met the train at Port Talbot and took samples from the churns when they were put out of the train. Port Talbot was three miles farther east than Briton Ferry. A police inspector and sergeant, by arrangement with the respondent, met the train at Briton Ferry and took possession of a churn as it was put out of the train and prevented the consignee from touching it, and retained possession of it until the arrival of the respondent at Briton Ferry about twenty minutes after the arrival of the train there. When

(1) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6: "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds . . . ."

the respondent arrived at Briton Ferry he took a sample from the churn there by dipping a pint measure into it. The churn had a label attached to it on which there were printed, amongst others, the following words: "Warranted up to arrival at the undermentioned station only. Pure new milk with all its cream and free from preservatives. To Crocker. Station Briton Ferry." The milk contained eighteen parts by weight of added water.

On behalf of the appellant it was contended that the sample was not taken in course of delivery within the meaning of s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879. (1)

The only material conditions in the contract between the appellant and his consignee were: "(1.) That the vendor agrees to supply pure milk free from any preservative well strained and refrigerated but the purchaser shall not be entitled to claim any compensation from the vendor in respect of any matter arising out of this contract unless written notice of the claim shall have been given to the vendor within three days after the occurrence of the default in respect of which the claim is made nor will any claim be recognised in respect of quality unless the samples shall have been taken immediately on arrival of the milk at the undermentioned railway station (or) immediately on delivery to the purchaser." "(6.) The milk shall be delivered to the purchaser at Briton Ferry Railway Station of the Great Western Railway Company and arrival of the milk at the said railway station shall constitute delivery by the vendor to the purchaser; carriage by rail to the said Briton Ferry Railway Station shall be paid by the vendor."

The justices were of opinion that the sample was procured at the place of delivery and in course of delivery to the purchaser or consignee in pursuance of the contract, as provided by s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879, and convicted the appellant.

(1) Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 3: "Any medical officer of health, inspector of nuisances, or inspector of weights and measures, or any inspector of a market, or any police constable under the direction and at the cost of the local authority appointing such officer, inspector, or constable, or charged with the execution of this Act, may procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee of such milk."

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The question for the opinion of the Court was whether the justices upon the facts came to a correct decision in point of law.

Holman Gregory, K.C., and *A. Neilson*, for the appellant. The words " in course of delivery " in s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879, mean immediately after the milk is placed on the platform. They do not include an interval of twenty minutes. The appellant's warranty ceased on arrival of the milk at the station. The contract between the parties defines the position of the inspector of food and drugs. If he is there at the time the milk arrives, and intimates that he is going to take a sample and does so, the sample would be taken " in course of delivery." But a decision that an inspector can be absent from the station at the time of arrival and take the sample twenty minutes later and after the milk has been in the hands of third parties would throw a serious burden upon milk vendors. The police were no doubt acting in accordance with instructions from the respondent, but the police have no authority to act in that way. [*Semple* v. *Dunbar* (1) and *Helliwell* v. *Haskins* (2) were referred to.]

Rigby Swift, K.C., and *C. E. Dyer*, for the respondent, were not called upon.

LORD READING C.J. The point raised in this case is whether, having regard to the contract between the vendor and purchaser, the sample of the milk sold by the appellant was taken " in course of delivery " within the meaning of s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879, which gives power to the medical officer of health, inspector of nuisances, or certain other inspectors or persons to procure " at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee, in pursuance of any contract for the sale to such purchaser or consignee of such milk."

The appellant sold the milk under a contract in writing, and his case rests upon a very strict view of the contract which, he contends, ought to be adopted. Upon his behalf it has been contended that at the moment of the arrival of the milk at the station, that is, when it is placed on the platform, delivery has taken place, and anything

(1) (1904) 6 F. (Just.) 65. (2) (1911) 75 J. P. 435.

which takes place thereafter is not done in the course of delivery. By clause 6 of the contract under which the vendor was to supply the milk, it was to be delivered at Briton Ferry Railway Station, and "arrival of the milk at the" station "shall constitute delivery by the vendor to the purchaser." The milk in fact arrived at Briton Ferry Station. It appears that the respondent, who is the inspector under the Sale of Food and Drugs Acts, was at Port Talbot Station, three miles away, at the time the train arrived at Briton Ferry Station. In order to get a sample of the milk at Briton Ferry he arranged with a police inspector and sergeant who met the train at Briton Ferry Station and took possession of the churn of milk as it was put out of the train and prevented the consignee, i.e., the purchaser, from touching it, and retained possession of it until the inspector arrived from Port Talbot about twenty minutes later and took a sample before the churn was handed over.

On behalf of the respondent it was contended before the justices that the sample taken by him when he arrived at Briton Ferry Station and found the milk still in the possession of the police inspector and sergeant, and before it had been handed over to the consignee, was taken "in course of delivery."

The justices came to the conclusion that in the circumstances of this case, notwithstanding that there had been an interval of twenty minutes during which the police had held the milk against the consignee, or prevented his obtaining physical possession of it, the sample taken at the expiration of that interval was taken in the course of delivery. When delivery was made at the station and the milk was placed on the platform for the consignee to take into his possession—or placed there and allowed to remain there—there was delivery under the contract. But that does not of itself answer the question before us, because we still have to decide whether the milk may nevertheless not have been "in course of delivery" within the meaning of the section when a sample was taken whilst the churn was still at the station and had not passed into the physical possession of the purchaser. No doubt if hours had elapsed since the arrival of the milk at the station it would be impossible to hold that there had not been delivery to the purchaser, and it appears to me that if in normal

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circumstances the churn had been placed on the platform and left there for the purchaser to fetch in the ordinary course of business, that would constitute delivery. But the question is whether, in the particular circumstances of this case, the delivery had been completed or whether the sample was taken in the course of delivery. That is entirely a question of degree. Obviously there may be such a set of facts as would make it absurd to say that a sample is taken in the course of delivery, and equally there may be such a set of facts as would make it impossible to say that, whatever the provisions of the contract may be, there can be no intervening period of time between the arrival of the milk at the station and the delivery to the consignee. If there could be no interval there never could be a sample taken in the course of delivery. According to the argument on behalf of the appellant the milk never could be in course of delivery unless the inspector took the sample while the milk was still in the train as it arrived at the station and when it was standing at the platform, and before the churn was removed from the train to the platform. That would be giving a very narrow interpretation to the meaning of the words "in course of delivery." I cannot conceive that the Legislature ever intended those words to be read in that sense; and moreover, if the arrival at the place of delivery is to be taken as delivery so as to make it impossible that during any interval of time after arriving at the station the milk is in course of delivery, the effect would be to defeat the operation of the statute. In normal circumstances the sample could not be taken unless the milk had arrived at the station.

In my judgment it is a question of degree, having regard to the particular facts of the case, whether the milk is still in course of delivery—assuming that those facts make it possible in law to support a finding of fact that the sample was taken in the course of delivery—or whether the time that has elapsed is sufficient to prevent the sample having been taken in the course of delivery. It is quite clear that in the nature of things there must be an intervening period. It is very difficult to measure it or to think of it in legal terms, because it is a question of degree, and it must vary according to the particular facts of each case. When, as in the present case, there is the fact that the police inspector and sergeant held the churn for twenty minutes adversely to the consignee and

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would not allow him to have possession of it, and that at the end of twenty minutes the inspector of food and drugs arrived and immediately took the sample, it appears to me that we cannot hold that the justices were not entitled upon those facts, if they chose, to come to the conclusion that the sample was taken in the course of delivery. That decision would determine this case; but I desire to add, for myself, that if I had been sitting as a justice I should have come to the same conclusion, although it is not material to the point we have to decide.

The object of the statute is to protect the public against adulteration and the Court will not, unless compelled by the words of the statute, construe it in such a way as to limit its operation. In my judgment *Helliwell* v. *Haskins* (1) is not against the view I have expressed, but supports it. In that case the Court came to the conclusion that everything that could possibly be done in order to give delivery had been done. Physical possession had actually passed into the hands of the purchaser of the milk, and, further, she carried away the purchased milk into her own house, and the door was shut and intervened between the vendor and purchaser. I can quite understand the justices coming to the conclusion, as they did in that case, that a sample taken afterwards was not taken while the milk was in the course of delivery. Everything had been done to complete the delivery from every point of view.

Semple v. *Dunbar* (2) tends to support, I think, the view which the justices took in the present case, and which, in my opinion, was right. In *Semple* v. *Dunbar* (2) the defendant's servant took the milk from the cart in a can and then poured it from that can into empty cans belonging to the purchaser, which were then standing in the purchaser's shop, and according to the contract, strictly regarded, that would constitute delivery to the purchaser; but the Court held that a sample taken immediately thereafter was taken in the course of delivery.

This appeal must be dismissed.

Ridley J. I have come to the same conclusion as the Lord Chief Justice and for the same reasons. In my judgment the question whether the milk is "in course of delivery" is, within certain limits,

(1) 75 J. P. 435. (2) 6 F. (Just.) 65.

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a question of fact. The statute does not mean that the question whether the milk is "in course of delivery" must be decided as a question of law, but it is a question of fact for the justices in each case. They have to determine whether there was, in point of fact, a cessation of delivery,—whether it had come to an end, or whether it was still in course of being perfected when the sample was taken. In the present case, as the justices have found that for the twenty minutes the delivery was still in course of being perfected, we cannot interfere with their decision. If they had decided the other way, the question would have been more difficult; it would still have been a question of fact, but I certainly should not have agreed with their decision. So far as I am concerned—though it has nothing to do with the correctness of their decision—I agree with it.

With regard to *Helliwell* v. *Haskins* (1), it is in my view a very instructive case. The facts were peculiar. The jug of milk had been received by the particular consignee, the purchaser of that jug of milk, and the door of her house had been shut by her. The inspector applied to the seller for a sample from his can after the jug of milk had been taken out of it. The seller thereupon admitted that his milk was watered, which would not be sufficient for the purposes of the inspector, and he returned to the door and obtained a sample from the purchaser. The justices found that the delivery was complete. It was a finding of fact, and the difficulty the majority of the Court felt was in seeing how they could reverse that decision of fact. As far as I am concerned, I cannot help adding that if I had been a member of the Court there I should probably have adopted the reasoning of Lord Alverstone C.J., who delivered a dissenting judgment. That case is, however, distinguishable from the present one, for the justices came to the opposite conclusion and found that the delivery was complete, and the difficulty was in interfering with their decision.

In the present case the finding of the justices is in accordance with our decision, and in my opinion they were right.

Low J. I should have been quite content to decide this case upon the footing that the question was one of fact and of fact only, and

(1) 75 J. P. 435.

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therefore for the justices, but if there be any law involved in the question, I am quite satisfied that the justices have taken a proper view of it in the conclusion they came to, and I therefore concur that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Vizard, Oldham, Crowder & Cash, for Spencers & Evans, Cardiff.*

Solicitor for respondent: *T. J. David, for Lewis M. Thomas, Port Talbot.*

J. E. A.

[COURT OF CRIMINAL APPEAL.]

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Oct. 23.

THE KING *v.* WHEELER.

Criminal Law—Perjury—Statement on Oath by Person charged after pleading Guilty and before Judgment—Evidence in Mitigation of Punishment—Materiality—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *ss.* 1, 2—*Perjury Act,* 1911 (1 & 2 *Geo.* 5, *c.* 6), *s.* 1.

The appellant having pleaded guilty at petty sessions to a charge under the Sale of Food and Drugs Act, 1875, was then sworn as a witness and wilfully made a false statement in order to influence the Court as to the punishment to be inflicted. He was subsequently convicted on an indictment for perjury in respect of that statement:—

Held, that the appellant was "a competent witness for the defence," under s. 1 of the Criminal Evidence Act, 1898, after he had pleaded guilty, and was "lawfully sworn as a witness" in the judicial proceeding, within s. 1 of the Perjury Act, 1911; and that the false statement which he made was material in that proceeding.

APPEAL against conviction.

The appellant was convicted at the Central Criminal Court of perjury; sentence was postponed, a certificate being given that it was a fit case for appeal to the Court of Criminal Appeal. The indictment charged the appellant with having committed perjury on February 16, 1916, at a Court of summary jurisdiction at Acton, as a witness in a judicial proceeding, by knowingly and falsely swearing that during the previous year he had not bought any separated milk. The appellant was a milk dealer and was charged before the justices at Acton, upon a summons under the Sale of

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Food and Drugs Act, 1875, with having sold to the prejudice of the purchaser milk which was deficient in fat to the extent of 10 per cent. He at once pleaded guilty, and the prosecutor thereupon made a statement to the Court in which he suggested that the deficiency in fat was due to the mixing of separated milk with new milk by the appellant. The advocate for the appellant then addressed the Court and stated that he was instructed that the appellant had not bought any separated milk for at least a year and was prepared to so state upon oath, and he admitted that there were three previous convictions against the appellant under the Act. The appellant was then duly sworn, and stated that he had not purchased any separated milk during the previous year; and evidence was adduced by the prosecutor to contradict that statement. The justices imposed a penalty of 40*l.* and costs. At the trial before the Recorder upon the indictment for perjury counsel for the appellant submitted that there was no case to go to the jury, upon the ground that, after he had pleaded guilty before the justices, the appellant was not a competent witness and therefore could not be lawfully sworn as a witness so as to be guilty of perjury under s. 1 of the Perjury Act, 1911; and further that the statement made by him before the justices was not material in that proceeding. The learned Recorder left the case to the jury; the appellant was convicted and appealed.

Vachell, K.C., and *Curtis Bennett*, for the appellant. The appellant was not "lawfully sworn" within s. 1 of the Perjury Act, 1911 (1), because he was not a competent witness at the time when he was sworn. The Criminal Evidence Act, 1898 (2), now regulates all

(1) 1 & 2 Geo. 5, c. 6, s. 1, subs. 1: "If any person lawfully sworn as a witness or as an interpreter in a judicial proceeding wilfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury . . . ."

(2) 61 & 62 Vict. c. 36, s. 1: "Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. . . . ."

Sect. 2: "Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution."

the rights of an accused person to give evidence, and s. 1 of that Act provides that he shall be "a competent witness for the defence at every stage of the proceedings." The words "stage of the proceedings" do not mean at any point of time during the hearing, but only refer to the various Courts through which the case may pass. Sect. 2 expressly prescribes the point of time at which the accused may give evidence—that is, immediately after the case for the prosecution is closed. The provisions of that Act, therefore, do not make the person charged a competent witness after he has pleaded guilty or been convicted, and in *Reg.* v. *Hodgkinson* (1) Darling J. so held.

[THE LORD CHIEF JUSTICE referred to *Rex* v. *Bright* (2), where *Reg.* v. *Hodgkinson* (1) was doubted.]

If the accused was not a competent witness he cannot be convicted of perjury: *Reg.* v. *Clegg.* (3) The case of *Reg.* v. *Gibbons* (4), relied on by the prosecution, was only a case of inadmissible evidence, and not of an incompetent witness. The statements made by the appellant were not material to any issue before the Court, even if given with the view of mitigating the punishment, and were therefore not material in the proceeding: *Reg.* v. *Tate* (5); *Rex* v. *Hewitt.* (6) In *Reg.* v. *Baker* (7) the accused did not plead guilty, but was himself giving evidence for the defence. Here there was a plea of guilty, and therefore no defence.

Travers Humphreys and *G. C. Whiteley*, for the Crown. In this case the appellant was a competent witness, that is, a person who was entitled to give evidence on oath. In s. 1 of the Criminal Evidence Act, 1898, the words "at every stage of the proceedings" mean every stage in any Court where the accused is a party. The "proceedings" do not terminate on verdict or on a plea of guilty, but continue until the very end of the case, until judgment or sentence. The special provisions of s. 2 of the Act of 1898 do not curtail or limit the general provision of s. 1 that the accused shall be a competent witness at every stage of the proceedings; s. 2 is merely directory as to the procedure to be followed in certain circumstances

(1) (1900) 64 J. P. 808.
(2) [1916] 2 K. B. 441; 12 Cr. Ap. R. 69, 70.
(3) (1868) 19 L. T. 47.
(4) (1862) 9 Cox, C. C. 105.
(5) (1871) 12 Cox, C. C. 7.
(6) (1913) 9 Cr. Ap. R. 192.
(7) [1895] 1 Q. B. 797.

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and deals only with that particular case, and in no way provides that the accused may not be a witness in other circumstances. In *Reg.* v. *Hodgkinson* (1) there was no real decision upon the point, because it was assumed that the accused could not have been prosecuted for perjury. That case was doubted in *Rex* v. *Bright* (2) and cannot be supported.

Vachell, K.C., replied.

The judgment of the COURT (Viscount Reading C.J., Ridley and Low JJ.) was delivered by

VISCOUNT READING C.J. The appellant was convicted of perjury and sentence was postponed pending an appeal to this Court. The material facts are as follows: [The Lord Chief Justice stated the facts.] The points now raised are whether the appellant made the false statement in the course of the judicial proceedings and whether he was lawfully sworn. The first point taken on behalf of the appellant is that he was called after the issue in the case had been determined, that is, after he had pleaded guilty, and that the statement which he then made was one which he was not competent to make. In other words, the contention is that he was not a competent witness when he was sworn. Secondly, it is said that the statement which he made was not material to the issue or in the proceeding.

On the first point it has been ingeniously argued that the Criminal Evidence Act, 1898, which for the first time, at any rate in most cases, allowed the accused to give evidence, only allows him to give evidence at a particular time during the proceedings. It is, therefore, desirable to consider the provisions of that Act. Sect. 1 provides: [His Lordship read the section.] Now the words of that section are of very wide import. It is said that the accused, when he has pleaded guilty, cannot be a "witness for the defence" because the defence is then at an end; but those words obviously mean on behalf of the defendant. Then it was argued that the words "at every stage of the proceedings" must be limited to the proceedings in the different Courts, that is, before magistrates or at the trial by a jury. We see no reason for so limiting the meaning of those words. We think that those words are intended to enable an accused person to give evidence at every stage of the proceedings where

(1) 64 J. P. 808. (2) [1916] 2 K. B. 441; 12 Cr. Ap. R. 69, 70.

evidence can properly be given; in other words, that wherever the defence can be heard evidence can be given by the defendant. It was further argued that the appellant was not a "competent witness for the defence," by reason of the provision of s. 2 that where the accused is the only person called by the defence as a witness to the facts of the case he shall be called "immediately after the close of the case for the prosecution," and that as he was not called as a witness at that time he was not a competent witness when he was called and could not be lawfully sworn. That argument, however, loses all force when the true meaning is given to s. 2. That section does no more than prescribe what is to happen in the circumstances therein described. Nowhere in that section or in the Act can we find any words to the effect that the accused can only be called as a witness at that time. It is very difficult to say that it was the intention of an enabling Act like this that the accused should not be entitled to give any evidence himself except in the particular way prescribed in s. 2. When once we have arrived at that conclusion as to the meaning of the Act the whole argument for the appellant on this point fails.

In our opinion, this evidence which was given with a view to mitigate the punishment was given at a "stage of the proceedings," and was clearly material in this judicial proceeding, which certainly continued until sentence was passed. It seems to us, then, that all the essential elements of perjury as defined by s. 1 of the Perjury Act, 1911, are present in this case and that all the contentions of the appellant must fail.

I will refer to some of the authorities which have been cited. When the decision of Hannen J. was given in *Reg.* v. *Clegg* (1) the accused was not a competent witness at all. Some day that question may again arise, but it is not necessary to consider it further now. Then reliance was placed upon the case of *Reg.* v. *Hodgkinson* (2), in which Darling J. took the view that after a plea of guilty the prisoner could not be sworn as a witness. It is to be observed that the learned judge in that case accepted the statement of counsel without argument that the prisoner, if he gave evidence, could not be convicted of perjury; and in *Rex* v. *Bright* (3)

(1) 19 L. T. 47. (2) 64 J. P. 808.
(3) 12 Cr. Ap. R. 69, 70.

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Darling J. doubted the correctness of his former decision. In our opinion that decision cannot be supported. In *Reg.* v. *Tate* (1) there are no doubt observations of Cockburn C.J. which go far to support the argument for the appellant that his statements were not material. That, however, was a peculiar case, and in *Rex* v. *Hewitt* (2) this Court has doubted whether it was rightly decided. It seems to have turned upon the question whether the evidence was material to the issue, and it is not necessary to consider whether it was right, because the question now is whether the evidence was material in the proceeding. In *Reg.* v. *Gibbons* (3) it was held that the evidence though inadmissible was material; and in the later case of *Reg.* v. *Baker* (4) the Court held that evidence given by a witness as to matters affecting his credit was material. It is unnecessary to consider those two cases further. Looking at all the cases cited, there is not one of them which can lead us to say that the evidence which was given by the appellant was not material in the judicial proceeding in which it was given, or that he was not a competent witness and was not lawfully sworn.

We have therefore come to the conclusion that the conviction was right and that this appeal fails.

Appeal dismissed.

Solicitors for appellant: *W. T. Ricketts & Son.*
Solicitor for the Crown: *Director of Public Prosecutions.*

(1) 12 Cox, C. C. 7.
(2) 9 Cr. Ap. R. 192.
(3) 9 Cox, C. C. 105.
(4) [1895] 1 Q. B. 797.

J. H. W.

DAVENTRY UNION, Appellants *v.* COVENTRY UNION, Respondents.

1916
Oct. 25, 30;
Dec. 15.

Poor Law—Settlement—Three Years' Residence—Irremovability—Child under Sixteen—Poor Removal Act, 1846 (9 & 10 *Vict. c.* 66), *ss.* 1, 3—*Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 34.

Under s. 1 of the Poor Removal Act, 1846, as amended, no person shall be removed from any parish in which such person shall have resided for one year next before the application for the warrant of removal, provided that the time during which such person shall be confined as a patient in a hospital shall be excluded in the computation of time. By s. 3 no child under sixteen residing in a parish with his father shall be removed from the parish in any case where the father may not lawfully be removed from the parish.

By s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would . . . . render him irremovable, he shall be deemed to be settled therein."

A child under the age of sixteen resided with his father in a parish from December 2, 1901, to April 24, 1905, except that during the week October 21 to October 28, 1902, the father was confined as a patient in a hospital in another parish in the same union as that in which the parish was situated:—

Held, that the father, and therefore the child also, became irremovable from the parish on December 9, 1902; that the three consecutive years' residence required by s. 34 of the Act of 1876, in the case of the child, included the year ending December 9, 1902; and that the child had therefore acquired a settlement in the parish, notwithstanding that the father by reason of the continuity of his residence having been broken by his confinement in hospital had not done so.

Special Case stated for the opinion of the Court pursuant to s. 11 of 12 & 13 Vict. c. 45.

By an order of two justices of the peace for the county borough of Coventry, dated March 9, 1916, it was adjudged that the parish of Hellidon in the Daventry Union in the county of Northampton was the place of the last legal settlement of William Noon, a pauper lunatic aged twenty-five years then confined in the asylum for the county of Warwick at Hatton and chargeable to the respondents, the guardians of the Coventry Union. The appellants, the guardians

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of the Daventry Union, gave notice of appeal against this order to the quarter sessions for the county of Warwick, and, the appeal having been duly entered, afterwards, by consent of the parties and by order of Scrutton J., this special case was stated.

The facts stated in the case were as follows: William Noon was the lawful son of Walter Noon and Elizabeth Noon, and was born in the parish of Catesby in the Daventry Union on September 12, 1890. From that date until October 27, 1894, when they finally left Catesby and went to reside in the parish of Hellidon in the Daventry Union, as hereinafter stated, William Noon and his parents resided together alternately in Catesby and Hellidon for varying terms of less than three years in either parish, but continuously within the Daventry Union, in such manner and under such circumstances as rendered them exempt by statute from removal from any part of the Daventry Union on and after September 12, 1891, until they ceased to reside within that union.

William Noon resided with his parents in the parish of Hellidon from October 27, 1894, for a term of three years and upwards uninterrupted by any disqualifying period or circumstances, namely, until September, 1898, when William Noon and his parents were last legally settled in that parish by virtue of their residence there. From December 2, 1901, to April 24, 1905, William Noon resided with his parents in the parish of Ilkeston in the Basford Union in the counties of Derby and Nottingham.

From October 21, 1902, to October 28, 1902, Walter Noon, the father, was confined as a patient in the Ilkeston Voluntary Hospital in the Basford Union. Save as aforesaid the residence of Walter Noon in Ilkeston was not passed under any of the circumstances specified in the first proviso to s. 1 of the Poor Removal Act, 1846, as amended by subsequent statutes, nor was the residence of William Noon or of his mother in Ilkeston passed under any such circumstances. Neither William Noon nor Walter Noon had since April 24, 1905, resided in any parish so as to become settled therein.

On July 22, 1913, William Noon having become chargeable to the Coventry Union, and not being exempt from removal from the Coventry Union or any other union, was sent from the Coventry Union under an order of a justice of the peace to the county of

Warwick asylum at Hatton, and he had ever since been confined in that asylum as a pauper lunatic.

On March 9, 1916, the above-mentioned order of justices was obtained on behalf of the respondent guardians adjudging William Noon to be last legally settled in the parish of Hellidon in the Daventry Union.

The appellants contended that William Noon was last legally settled in the parish of Ilkeston in the Basford Union.

The respondents contended that William Noon was last legally settled in the parish of Hellidon in the Daventry Union.

The question for the opinion of the Court was whether upon the facts stated William Noon was last legally settled in the parish of Hellidon in the Daventry Union or not.

Sydney Davey, for the appellants. The question is whether the pauper lunatic, in the circumstances stated in the case, acquired a settlement in the Basford Union, under s. 34 of the Divided Parishes Act, 1876, by having acquired a settlement of his own by residence in a parish in that union. In *Dorchester Union* v. *Weymouth Union* (1) it was decided that, under s. 34, there must have been a residence for three consecutive years under such conditions in each year as would create a status of irremovability; and the case of *Newark Union* v. *Maidstone Union* (2) confirms that decision. A legitimate child can before the age of sixteen acquire a settlement of its own by residence: *Hackney Union* v. *Kingston-upon-Hull Incorporation for the Poor.* (3)

It is not necessary, as contended by the respondents, that in a case like this in order to acquire a settlement under s. 34 there should be residence for four years, that is, one year to get the status of irremovability and then three years during each of which the person is irremovable: *West Ham Union* v. *Holbeach Union.* (4) In *Tewkesbury Union* v. *Upton-on-Severn Union* (5) Lord Alverstone C.J. may seem to have said that three years' residence after the status of irremovability was acquired was necessary; but that was not the point for the decision of the Court in

(1) (1885) 16 Q. B. D. 31.
(2) (1905) 93 L. T. 602.
(3) [1912] A. C. 475.
(4) [1905] A. C. 451.
(5) [1913] 3 K. B. 475.

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that case. Although the father, owing to the break caused by his stay in the hospital, was prevented from acquiring a settlement in the Basford Union, yet it is clear that the son has complied with the conditions required by s. 34 and acquired a settlement of his own in that union by three years' residence. That is the natural reading and proper construction of s. 34. There is nothing in the decision of the House of Lords in *Fulham Parish* v. *Woolwich Union* (1) which is contrary to the contention of the appellants.

Herbert Davey, for the respondents. The residence of the son in the Basford Union was not such in each of three years as to confer a settlement upon him under s. 34. There must be a term of three years' continuous residence from the time when the father became irremovable; and by reason of the break when the father was in the hospital the son did not so reside for three years in the Basford Union: *Doncaster Union* v. *Woolwich Union*. (2) A child is not irremovable if the father is not irremovable: Poor Removal Act, 1846, s. 3. Therefore during the week that the father of the lunatic was in hospital, the father being removable, the lunatic was also removable. Where the father does not acquire a settlement by residence the term of three years' residence which is required to give the son a settlement of his own only begins to run at the date when the father in fact first acquires the status of irremovability. In the present case the father did not become irremovable until October 9, 1902, and as the lunatic did not reside in Ilkeston for three years after that date he never acquired a settlement in the Basford Union, and he therefore retains the settlement previously acquired in the appellant union.

S. Davey replied.

Cur. adv. vult.

1916. Dec. 16. VISCOUNT READING C.J. read the following judgment:—The question is whether the justices have rightly decided that the last legal settlement of one William Noon, a pauper lunatic, is in the Daventry Union and not in the parish of Ilkeston in the Basford Union. The answer depends upon whether or not William Noon is to be deemed to have acquired a new settlement

(1) [1907] A. C. 255. (2) [1915] 1 K. B. 563.

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in the Basford Union notwithstanding that his father's settlement remains in the Daventry Union.

William Noon was born on September 12, 1890, and is the legitimate son of Walter Noon and Elizabeth Noon. William Noon and his parents resided together for a continuous period of nearly four years until September, 1898, in the parish of Hellidon in the Daventry Union in such circumstances that the son and the parents were at this date last legally settled in this parish. Subsequently William Noon resided with his parents from December 2, 1901, to April 24, 1905, in the parish of Ilkeston in the Basford Union. But during one week of this period of residence, namely, from October 21, 1902, to October 28, 1902, the father was confined as a patient in a voluntary hospital in another parish in the Basford Union.

By s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise." It has been held that to acquire a settlement under this section there must be continuous residence for three consecutive years, in each of which the nature of the residence is such that it would have conferred a status of irremovability: see *Dorchester Union* v. *Weymouth Union*. (1) The stay of the father in the hospital for one week broke the continuity of the father's residence in the parish of Ilkeston. For the purpose of acquiring a settlement under the Divided Parishes and Poor Law Amendment Act, 1876, the period of time must be unbroken and therefore must be computed from October 28, 1902, when the father left the hospital. As his residence at Ilkeston ceased on April 24, 1905, he has not acquired a settlement in the Basford Union. It follows, and is admitted by the parties to this appeal, that his last legal settlement is in the Daventry Union.

Does it follow, as is contended by the respondents, that the son cannot have acquired a new settlement and that his last legal settlement is also in the Daventry Union? The statute of 1876

(1) 16 Q. B. D. 34.

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confers a settlement, but it does not create a status of irremovability. Two conditions must be fulfilled before a person is deemed to have acquired a new settlement under the Act of 1876. The first is residence, as hereinbefore stated, for three consecutive years, and the second is residence in such circumstances as would in each of such years render him irremovable. Upon the facts stated the son has resided for the necessary period with his parents in the same parish in the Basford Union, that is, from December 2, 1901, to April 24, 1905. There has been no break in the continuity of his residence such as occurred in that of the father, and the first condition is therefore satisfied. But to confer a settlement the residence must be "in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable." The determination of the question raised by this case depends upon the true meaning of this section.

By the Poor Removal Act, 1846, s. 1, as amended by the Poor Removal Act, 1861 (24 & 25 Vict. c. 55), s. 1, and the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 8, a status of irremovability is conferred upon a person who has resided for one year in the same parish or part of the union. By the first proviso in s. 1 of the statute of 1846 confinement in a hospital must be excluded for all purposes in the computation of time necessary to confer the status of irremovability; consequently by reason of the father's stay for one week in the hospital he did not become irremovable until December 9, 1902, when he had completed one year's residence excluding the week in the hospital. By the first section of the Act of 1848 (11 & 12 Vict. c. 111), amending the second proviso of the Poor Removal Act, 1846, the son is removable if the father is removable; and the son is irremovable if the father is irremovable. It is not in dispute that the father did not in fact become irremovable from the parish of Ilkeston in the Basford Union until December 9, 1902, and therefore the son did not become irremovable until this date.

The respondents' contention is that the period requisite to confer a settlement under the Act of 1876 must be computed from this date and is insufficient, and therefore the son cannot be deemed to have acquired a new settlement. This contention, however, assumes

that in order to fulfil the conditions under the Act of 1876 it must be established that the person *was* irremovable during the whole of each of the three years' residence. This is not the language of the statute, which requires that the residence of the person for the term of three years shall have been in such circumstances in each of such years as would "*render* him irremovable." Residence from December 2, 1901, to December 9, 1902, is, in my opinion, residence in this year which would render him irremovable, and therefore the period was completed on December 9, 1904. To hold otherwise would involve the necessity for a qualification of four years' residence, that is, one year to acquire the status of irremovability and three years thereafter, during each of which the person was irremovable. In my judgment this interpretation gives an incorrect meaning to the words "would render him irremovable." I construe them as meaning that the residence during each of the three years must be such as would create the status of irremovability. I can see no reason why, if the Legislature had intended that there must be three years' residence in each of which the person was irremovable, it should have used the words in question, which are fairly apt words to convey that the residence must be of such a nature in each of the years as would make the person irremovable at the end of each of them. This appears to be the view adopted by Day J. in *Dorchester Union* v. *Weymouth Union* (1), where he says: "Each year must be complete, and free from anything which would affect the status of irremovability by cutting out any portion of the time"; and by A. L. Smith J. (2): "To confer a settlement there must be residence for three consecutive years, in each of which the nature of the residence is such that the residence would have conferred a status of irremovability."

Therefore I come to the conclusion that both the conditions requisite are satisfied in the present case. That unemancipated residence may confer an independent settlement has been placed beyond question by the House of Lords in *West Ham Union* v. *Holbeach Union* (3), *Fulham Parish* v. *Woolwich Union* (4), and *Hackney Union* v. *Kingston-upon-Hull Incorporation for the Poor* (5),

(1) 16 Q. B. D. 33.
(2) 16 Q. B. D. 34.
(3) [1905] A. C. 450.
(4) [1907] A. C. 255.
(5) [1912] A. C. 475.

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and I can see no reason why it should not be held that William Noon has acquired an independent settlement. I come to the conclusion that William Noon, the pauper lunatic, is to be deemed to have acquired a new settlement, that is, in the parish of Ilkeston in the Basford Union, and that he is not to be deemed last legally settled in the Daventry Union. I am therefore of opinion that this appeal should be allowed with costs.

RIDLEY J. I agree with the Lord Chief Justice and have nothing to add.

VISCOUNT READING C.J. Low J. has asked me to state that he also agrees with my judgment.

Appeal allowed.

Solicitors for appellants: *Kingsford, Dorman & Co., for W. F. & W. Willoughby, Daventry.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for Hughes & Masser, Coventry.*

F. O. R.

MEGUERDITCHIAN *v.* LIGHTBOUND AND OTHERS.

[1915 M. 786A.]

1916
Nov. 21, 30.

Solicitor—Lien—Documents obtained by Negotiation without Litigation — Bankruptcy — Trustee — Documents in Solicitors' Hands after Bankruptcy.

The defendants, a firm of solicitors, were instructed by Z. to obtain the restitution by B. of certain documents, and took various steps with that object. Z. became bankrupt, and the plaintiff was appointed receiver in the bankruptcy. He then instructed the defendants to take steps to obtain the documents, and eventually, as the result of negotiations conducted by them, an agreement was made between the plaintiff and the representatives of B., who had died in the meantime, under which the documents were handed to the defendants as plaintiff's solicitors. The defendants claimed a lien on them for all their costs arising from the attempts to recover them as from the time of the instructions given them by Z., claiming that the documents were the fruits of their exertions. The plaintiff admitted his liability for costs incurred on his instructions, and paid money into Court to satisfy those costs, and claimed the return of the documents :—

Held, (1.) that no lien exists on the fruits of a mere negotiation without litigation; and (2.) that in any case the possession of the documents by the defendants was obtained as the result of the fresh instructions given by the plaintiff and was not attributable to anything done on the instructions of Z., and that, therefore, no lien on them existed in respect of the costs incurred on Z.'s instructions.

ACTION tried before Rowlatt J. without a jury.

The plaintiff, as surviving trustee in bankruptcy of the estate of one Zervudachi, claimed the delivery up of certain documents from the defendants, Lightbound, Owen & Co., a firm of solicitors, or damages for their detention or conversion. The defendants set up a right of lien over these documents for their costs.

In August, 1906, Zervudachi obtained a transfer to him of concessions of certain asphalte mines by the Ottoman Government, which entitled him to 70 per cent. of the total holding, of which share one Shakour Pasha held 30 per cent. Rowlatt J. held that the share of Shakour was an equitable one only, and he did not appear as a principal in any of the transactions. On September 24 Zervudachi

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made an agreement with a financier named Bergheim whereby the latter was to purchase the mines and promote a company to work them; and for this purpose the documents relating to the concessions, which were the documents in question, were handed over to him. Bergheim did not fulfil his bargain, and Zervudachi on October 20, 1909, obtained judgment for damages against him in the Egyptian Courts; but the documents were not handed over by Bergheim. Zervudachi was advised that this judgment was not enforceable in this country, and accordingly in April, 1910, he instructed the defendants to obtain the documents from Bergheim. A representative of the firm went to Egypt and collected evidence to support the claim, and a draft writ was prepared. In November, 1911, Zervudachi became bankrupt under the Egyptian law, and the plaintiff and two others were appointed syndics (receivers in bankruptcy), the plaintiff alone now remaining. On February 17, 1912, the syndics instructed the defendants by letter as follows: "We the undersigned syndics of Mr. Zervudachi, actually (1) bankrupt, beg to charge you to introduce as soon as possible a claim against Mr. Bergheim for undue confiscation of documents which had been delivered to him by Mr. Zervudachi. The fact that Mr. Bergheim has arbitrarily confiscated the said documents has been undoubtedly one of the chief causes of Mr. Zervudachi's bankruptcy. He was reduced to absolute incapacity not having the documents at his disposal. And now, after Mr. Zervudachi's bankruptcy, we find ourselves in precisely the same difficulties. At least three different groups have applied to us with the object to buy the asphalte concessions, but in default of documents we are not in a position to negotiate. . . . . We shortly shall forward you all written evidence in support of our claim." The defendants accordingly entered into negotiations with Bergheim, who, shortly afterwards, in September, 1912, was killed in an accident. Eventually on May 30, 1913, an agreement was made between the personal representatives of Bergheim and the syndics whereby the documents were handed over to the defendants, as the syndics' solicitors, in consideration of 300*l.* and the abandonment of all further claims against Bergheim's estate. The defendants then sent in their bill of costs to the

(1) Presumably representing the French *actuellement*, which means not "actually" but "at present."—F. P.

plaintiff covering all the work done by them in relation to the recovery of the documents since they were first instructed by Zervudachi. The plaintiff contended that he was only liable for the costs incurred as from the time the syndics instructed the defendants, and that the defendants must prove in the bankruptcy for the rest; and he paid money into Court in respect of his admitted indebtedness. The defendants refused to deliver up the documents, claiming a lien on them in respect of the whole of the above costs.

E. M. Pollock, K.C., and *Eustace Hills*, for the plaintiff. The defendants had not these documents in their possession at the time of the bankruptcy of Zervudachi; therefore at that time they had no lien upon them. They only got possession of them by acting on the instructions of the syndics, who were new clients initiating fresh proceedings. Zervudachi then had no interest in the documents, and the lien of a solicitor is limited to the interests of his client for whom he acted—per Vaughan Williams L.J. in *In re Wright's Trust* (1)—and he cannot claim a lien beyond and larger than his instructions; the right to lien is an implied part of his contract with the client: per Chitty J. in *In re Capital Fire Insurance Association*. (2) It could not have been an implied part of the contract with the syndics that the solicitors should have a lien for a debt which was not that of the syndics. Had the syndics employed another firm of solicitors the question could not have arisen; but the identity of Zervudachi's solicitors with those of the syndics was an accident only. The case is covered by authority. In *In re Rapid Road Transit Co.* (3) a company brought an action against its directors, employing a solicitor. The company was wound up, and the liquidator continued the action, employing the same solicitor, but afterwards discharged him and employed another solicitor. The former solicitor claimed a lien on the documents for his costs, and it was held that he had a lien on all the documents which had come into his possession and on which he had acquired a lien before the winding up, but not over those acquired after the winding up. [Viner's Abridgment, vol. 7, tit. Creditor and Bankrupt, p. 74, par. 8, citing *Ex parte Bush* (4), was referred to.]

(1) [1901] 1 Ch. 317, 325.
(2) (1883) 24 Ch. D. 408, 415.
(3) [1909] 1 Ch. 96.
(4) (1734) Not reported elsewhere.

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Leslie Scott, K.C., and *L. F. C. Darby*, for the defendants. There are two kinds of solicitor's lien—namely, a retaining lien, which is the right to retain all documents the property of the client against the whole of that client's indebtedness to him as a solicitor, whether incurred in respect of those documents or not; and the cases cited on behalf of the plaintiff refer to that lien only; secondly, a particular lien, which entitles the solicitor to hold the fruits of his exertions as a solicitor as against his costs incurred in recovering those fruits. The general rule is not disputed that when a change of client has taken place through the operation of the law of bankruptcy the solicitor is not entitled to retain documents coming into his possession after the bankruptcy for costs incurred before the bankruptcy. But that rule has nothing to do with the present case, where the defendants were employed by partners, Zervudachi and Shakour Pasha, of whom one only, Zervudachi, has become bankrupt. The solicitors may hold the documents of the partnership for the whole of his charges.

The solicitors have a particular lien, for possession of these documents was obtained as the fruit of all their exertions from the time they were instructed by Zervudachi, in visiting Egypt to collect evidence, preparing draft writ, and conducting negotiations with Bergheim's personal representatives, for it is immaterial whether they were obtained by litigation, the threat of litigation, or by negotiation. The analogy is that of the lien of a salvor on salvage. The leading case is *In re Meter Cabs, Ld.* (1) In that case a limited company made a claim in an arbitration. It went into liquidation, and the company's solicitor, with the sanction of the liquidators, compromised the claim for 29*l.*, which was paid to him. It was held that he had a lien on this money for his costs of recovery, including those incurred prior to the liquidation. The principle is that it is not just that the client should get the benefit of the solicitor's exertions without paying for them: per Cotton L.J. in *Guy* v. *Churchill.* (2) [*In re London Drapery Stores* (3) was also referred to.]

Pollock, K.C., in reply. On the evidence there was no agency and therefore no partnership between Zervudachi and Shakour; and *Turner* v. *Deane* (4) shows that an attorney in possession of the

(1) [1911] 2 Ch. 557.
(2) (1887) 35 Ch. D. 489, 491.
(3) [1898] 2 Ch. 684.
(4) (1849) 6 Dow. & L. 669.

documents of one partner has no lien on them for a debt due from the partnership.

There was a complete break in legal relations in consequence of the bankruptcy when the syndics were appointed. Had there been an action pending which was continued by the syndics the case might be different; but without the fresh instructions of the syndics the defendants could not have obtained possession of these documents. In *In re Meter Cabs, Ld.* (1) something—namely, the pending litigation—which spoke from an anterior date was adopted by the liquidators, and therefore they could not be heard to say that they had initiated proceedings at a later date.

Cur. adv. vult.

Nov. 30. ROWLATT J. read the following judgment:—The plaintiff in this action is the last remaining of three syndics, or assignees, in an Egyptian bankruptcy, of the estate of one Zervudachi, the other two syndics having been discharged. He seeks to recover certain documents which by an agreement of May 30, 1913, the representatives of one Bergheim, deceased, agreed to hand over to the syndics in consideration of a payment of 300*l.* The defendants are a firm of solicitors who negotiated this agreement for the syndics, and received the documents as their solicitors on their behalf. The defendants claimed to be entitled to a lien on the documents for their charges, not only in respect of negotiating the agreement for the syndics, but also in respect of work done before the bankruptcy in preparing to enforce on behalf of Zervudachi or of Zervudachi and one Shakour Pasha a claim to these same documents, which claim was after the bankruptcy compromised by the agreement above mentioned. The plaintiff tendered, and has brought into Court, the amount of the charges incurred on the instructions of the syndics after the bankruptcy, but contests the lien for the earlier charges.

It appears that Zervudachi was the owner of three Turkish concessions which with other documents relating thereto (the whole forming those now in question) he had handed to Bergheim under an agreement which he said Bergheim had failed to carry out,

(1) [1911] 2 Ch. 557.

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and on that footing he was claiming to have them restored by Bergheim. It further appears from letters exchanged between Zervudachi and Shakour that Shakour had what is called a 30 per cent. participation in the property. It is clear, I think, that Shakour's interest was what one may call an equitable interest only, and that Zervudachi alone could give a receipt to Bergheim for the documents. The defendants themselves have taken this view, as is shown by the fact that in a writ, which they drafted but never issued against Bergheim, they made Zervudachi sole plaintiff, and also by the fact that the agreement of May 30 was framed by them as between the syndics and the representatives of Bergheim only, Shakour not being a party. It follows that the plaintiff, without Shakour, has a right to maintain this action.

The defendants in the first place set up a general lien as solicitors, extending, so they contend, to the costs incurred before the bankruptcy. The answer to this is that they did not get possession of the documents and so had no lien until they got them on behalf of the syndics as their solicitors after the bankruptcy, and that they could not then set up against the syndics, the clients for whom they obtained them, a lien for charges incurred by another client, namely, Zervudachi, in respect of previous work done for him: see *In re Rapid Road Transit Co.* (1) But then it was said by Mr. Leslie Scott that Shakour, by reason of his interest in the concessions and his relation to Zervudachi, which Mr. Leslie Scott said was one of partnership, was liable for these costs, and that there would be a lien against his equitable interest in the documents, which lien still subsisted now that the syndics had displaced Zervudachi. I cannot follow this argument. Assume what would be the position most favourable to Mr. Leslie Scott's contention, that Shakour was co-owner with Zervudachi, and is co-owner with the syndics—though I do not think he was—how could a general lien be set up against the syndics and Shakour for a debt due from Shakour and Zervudachi? This would make the syndics pay Zervudachi's debt.

Then it is said that the defendants, having by negotiation on behalf of the syndics obtained delivery of these documents against a payment by the syndics of 300*l.*, are entitled to a particular lien

(1) [1909] 1 Ch. 96.

upon them as property recovered or preserved for their charges in respect of their services in bringing about this settlement; and, further, that the whole bill must be taken as one, and that consequently the lien extends to the whole of it, on the principle of *In re Meter Cabs, Ld.* (1) I can find no authority for a lien of this character upon the fruits of a mere negotiation conducted by a solicitor, nor do I think it can be supported on principle. It is true that long before there was any statutory provision for the making of charging orders on property recovered or preserved the Courts had interfered to prevent suitors receiving the fruits of judgments recovered in the Courts, or of the compromise of litigation initiated in the Courts, without paying the attorneys or solicitors to whose efforts that result was due, and in that sense it may be said that there was a lien for costs in such cases at common law. If the principle on which this so-called lien rested was that a piece of business entrusted to a legal practitioner to carry through was to be likened to a chattel placed in the possession of a craftsman for the purpose of his bestowing labour upon it, it might be argued that such a principle was wide enough to cover the present case. If that was the principle, it rested upon a most fanciful analogy. But I do not think that was the principle. The so-called lien was a charge enforced by the Court in the cause, and its existence depended on the power of the Court to make the other party pay again if he paid direct to his adversary with notice of the attorney's claim: see for example *Ormerod* v. *Tate.* (2) It did not rest, like a true lien, on possession at all. If Mr. Leslie Scott's argument is right, the solicitors, by notice to Bergheim's executors, could have prevented them handing over the documents to the plaintiff, and I suppose the solicitors to the executors could by notice to the plaintiff have established a charge on the 300*l.* and prevented the executors paying it to the plaintiff. I think this is a reductio ad absurdum. It would be a remarkable state of things if each party to a bargain were to be hampered in obtaining its fulfilment by questions of costs arising between the other party and his solicitors. For these reasons I think this point made on behalf of the defendants is misconceived, but I may add that, even if there was such a lien, I should see no ground

(1) [1911] 2 Ch. 557. (2) (1801) 1 East, 464.

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for holding that it would extend to cover the charges for steps taken and negotiations conducted for Zervudachi, merely because when his interest ceased and passed to the syndics they instituted anew negotiations with the same object. It is not the case of an indivisible proceeding like an action or an arbitration where a trustee in bankruptcy or liquidator intervenes and takes the benefit of the steps already taken. Who knows whether Bergheim's executors would have ever compromised with Zervudachi, or to what extent his negotiations may have promoted the ultimate success of the syndics ?

There must be judgment for the plaintiff with costs for the delivery up of the documents on payment of the amount paid into Court for which they have the ordinary general lien.

Judgment for plaintiff.

Solicitors for plaintiff : *Meynell & Pemberton.*

Solicitors for defendants : *Lightbound, Owen & Co.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1916
Nov. 30.

HORWOOD *v.* MILLAR'S TIMBER AND TRADING COMPANY, LIMITED.

Contract—Illegality—Public Policy—Assignment of Present and Future Earnings—Covenants in restraint of Personal Freedom—Not to leave Present Employment without Sanction of Assignee.

By an indenture made between the mortgagor (a clerk in the employment of the defendants) and the plaintiff (a money-lender) the mortgagor, who was indebted in various sums to creditors whom the money-lender agreed to pay on having the repayment secured to him in manner thereinafter appearing, assigned to the plaintiff (inter alia) all the salary, wages, or other moneys then or thereafter during the continuance of the security to become due to him under his employment with the defendants or with any other employers to hold to the plaintiff absolutely, but subject to a proviso for redemption. The mortgagor then covenanted that he would repay the plaintiff by certain instalments; that during the continuance of the security he would not, without the express sanction in writing of the plaintiff, determine his engagement with the defendants or other his employers for the time being; that he would not borrow or attempt to borrow any money or part with, sell, or pledge his furniture, chattels, or effects, or obtain or endeavour to obtain credit or permit any one to pledge his credit (save his wife in the case of ordinary tradesmen's books for weekly settlement) or make himself or his property answerable for any sum of money whether legally or morally; and that he would not, without the plaintiff's consent in writing, remove from his then dwelling-house or take any other. The plaintiff, alleging that the mortgagor had committed breaches of the covenants contained in the indenture, gave notice of the assignment to the defendants and brought an action to recover salary due from them to the mortgagor:—

Held, affirming the decision of the Divisional Court [1916] 2 K. B. 44, that the contract was entire and indivisible, and was bad as being contrary to public policy inasmuch as it unduly and improperly fettered the mortgagor's liberty of action and the free disposal of his property.

APPEAL from a decision of Lush and Sankey JJ. (1) whereby they declared that a contract contained in a certain deed dated July 1, 1913, and made between one Bunyan and the plaintiff, was bad as being contrary to public policy.

(1) [1916] 2 K. B. 44.

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The plaintiff, who described himself in the deed as a builder, was stated to be an unregistered money-lender. By his action, which was tried in the City of London Court, he claimed that an account be taken of all salary or wages and all overtime, extras, increments, remuneration, and bonuses due from the defendant company to Bunyan on June 24, 1915, or which had accrued due from the defendants to Bunyan since that date, which salary, &c., had by the deed in question been assigned by Bunyan to the plaintiff, and notice thereof had been duly given by the plaintiff to the defendants. The plaintiff further claimed payment by the defendants of the amount found due on the taking of the account.

Bunyan was a clerk in the employ of the defendants, and it appeared that, being indebted to various persons, chiefly money-lenders, in certain small sums amounting to about 30*l.*, he applied to the plaintiff for a loan to enable him to pay off his debts. The plaintiff agreed to make him an advance on the security of the deed above referred to coupled with a policy of insurance upon his life.

The deed recited that "Whereas the mortgagor is indebted to the various persons set out in the first schedule hereto amounting to the sum of 42*l.* 8*s.* 3*d.* which the mortgagor hereby declares to be a complete statement of all his liabilities whatsoever (which declaration is and shall be considered to be the prime factor inducing the lender to enter into this arrangement) and has requested the lender to pay and discharge the same on his behalf which the lender has agreed to do on having the repayment of such sum of 42*l.* 8*s.* 3*d.* together with the sum of 31*l.* 16*s.* agreed interest thereon making a total of 74*l.* 4*s.* 3*d.* secured to him" in manner thereinafter appearing.

The following were the material clauses of the indenture:—

"1. In pursuance of the said agreement and in consideration of the premises the mortgagor as beneficial owner hereby assigns unto the lender—first, all that policy of assurance particulars whereof are set forth in the second schedule hereto and all money assured by or to become payable under the said policy and the full benefit thereof; secondly all that salary or wages now due or henceforth to become due to him the mortgagor in connection with his engagement or employment with Messrs. Millar's Timber and Trading Company Limited or any other situation post or office that he may

during the continuance of these presents hold in the said company or with or in any other company office person or firm whatsoever, together with all overtime extras increments and remuneration in connection with any such employment receivable or to be received by him in respect thereof including any moneys that may or might be paid to him by way of bonus or otherwise should he be discharged from or leave his present employment or that he may or might be paid or become payable to his personal representatives or estate by his firm in the event of his death To hold unto the lender absolutely but subject to the proviso for redemption hereinafter contained.

"2. Provided always and it is hereby agreed that if the mortgagor shall pay to the lender the said sum of 74*l.* 4*s.* 3*d.* together with all interest and other moneys (if any) by any means becoming due hereunder by the instalments at the times and in manner hereinafter provided the lender shall at any time thereafter upon the request and at the cost of the mortgagor reassign the premises hereinbefore assigned to the mortgagor or the person or persons claiming under him or as he or they may direct.

"3. And in further pursuance of the said agreement and for the consideration aforesaid the mortgagor covenants with the lender: (*a*) To pay the lender the said principal sum of 74*l.* 4*s.* 3*d.* by instalments of 2*l.* per month on the first day in each month the first payment to be made on the first day of August next . . . . (*d*) That during the continuance of these presents the mortgagor shall diligently and faithfully devote himself to his duties wheresoever he may be employed and will not do or suffer anything to be done which may or might cause him to be dismissed or liable to be dismissed or have his salary reduced but shall use his best endeavours to advance his position wheresoever employed And shall not without the express sanction in writing of the lender determine his engagement with Messrs. Millar's Timber and Trading Company Limited or other his employer for the time being . . . . (*h*) During the continuance of these presents not to borrow apply for or attempt in any way to borrow or raise any sum or sums of money whatsoever whether on security or otherwise nor part with give away sell settle pledge or otherwise dispose of any of the furniture chattels or other goods and effects now in or about

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or hereafter to be brought upon his present residence (the whole of the existing household furniture goods and effects being and it is expressly declared by the mortgagor to be his sole and unincumbered property) and not to obtain or endeavour to obtain credit or buy any articles or goods on credit or to be paid for by deferred payments nor to pledge the credit of the mortgagor or permit any other person to pledge his credit (save his wife in the case of ordinary tradesmen's books for weekly settlement such books to be produced to the lender for his inspection on demand) and also not to enter into any gambling contract bet or wager or become bail or security for or on behalf of any person whatsoever or in any other way make himself or his property answerable for any sum or sums of money whether legally or morally . . . . (*i*) Not without the consent of the lender in writing first had and obtained to remove from or take any other dwelling-house or residence."

" 5. (*d*) If the mortgagor shall die or become bankrupt or threaten to file his petition in bankruptcy or make any arrangements with his creditors, or in case any moneys which ought under the provisions hereof to be paid by the mortgagor are not so paid on the day hereby appointed for payment thereof, or if he the mortgagor shall commit a breach of or fail to observe any of the covenants or stipulations herein contained on his part to be observed and performed or suffer any of his goods to be seized distrained on or taken in execution Then and in any of such cases the whole of the said sum of 74*l.* 4*s.* 3*d.* or the unpaid part thereof together with all interest and other moneys (if any) which may up to that time have arisen and remain unpaid shall immediately become payable and recoverable with interest after the rate of one shilling in the pound per month from the date of such event or breach or if more than one the first of such events or breaches . . . ."

The plaintiff, alleging that Bunyan had committed breaches of the covenants in the indenture, gave notice of the assignment to the defendants on June 24, 1915, and required them to pay to him the moneys thereby assigned as and when they became due. Notwithstanding this notice, the defendants paid Bunyan his salary from the date of the notice sent to them down to November, 1915, when Bunyan joined the Army. The plaintiff then brought this action in the City of London Court. The judge of that Court gave

judgment for the defendants. An appeal from that decision was dismissed by the Divisional Court on the ground that the contract was bad as being contrary to public policy. The plaintiff appealed.

Compston, K.C., and *Barrington-Ward* (for *Rowand Harker*, serving with His Majesty's Forces), for the appellant. This deed is not void as being contrary to public policy.

[WARRINGTON L.J. In *Mason* v. *Provident Clothing and Supply Co.* (1) Lord Shaw lays it down that the freedom of a man to earn his living as best he can is a freedom which it is not alone in his interest but in the public interest that the law should protect.]

That was a case of master and servant. This is that of lender and borrower, or vendor and purchaser. The ground of objection to such a deed is entirely novel, and the Court will not create a new rule of public policy. If the plaintiff were now seeking to enforce the deed as against Bunyan the observations of Lord Shaw would be very pertinent, but different considerations arise as between the plaintiff and the defendants.

[WARRINGTON L.J. Under this deed the man might be prevented from doing his duty to his country by enlisting in the Army.]

There is a clear distinction between the case of enforcing such a deed as between master and servant and the determination of the validity of the assignment as between the assignee and the employer. The public has no interest in that matter. Enlisting in the Army could not be held to be a breach of any of the covenants in the deed. A man may restrict his own freedom of trade for reasonable consideration: *Mitchel* v. *Reynolds*. (2) The Court will not inquire into the adequacy of the consideration: *North Western Salt Co.* v. *Electrolytic Alkali Co.* (3) At any rate, the assignment contained in clause 1 of the deed is not invalid and the contract is not entire and indivisible: *Tailby* v. *Official Receiver*. (4) The assignment can be separated from those covenants (if any) which are contrary to public policy.

[SCRUTTON L.J. referred to *Mason* v. *Provident Clothing and Supply Co.* (5), where Lord Moulton said: "My Lords, I do not doubt

(1) [1913] A. C. 724.
(2) (1711) 1 P. Wms. 181.
(3) (1912) 107 L. T. 439, 444.
(4) (1888) 13 App. Cas. 523, 549.
(5) [1913] A. C. 724, 745.

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that the Court may, and in some cases will, enforce a part of a covenant in restraint of trade, even though taken as a whole the covenant exceeds what is reasonable. But, in my opinion, that ought only to be done in cases where the part so enforceable is clearly severable, and even so only in cases where the excess is of trivial importance, or merely technical, and not a part of the main purport and substance of the clause. It would in my opinion be pessimi exempli if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required."]

It is submitted that Lord Moulton there went too far. The Court will give effect to the assignment of the salary, which is perfectly good: *In re Mirams.* (1) The other provisions which do not affect any question arising between the assignee and the employer may be good or bad, but if bad they may be severed from the assignment, and effect can be given to the innocuous part of the deed.

E. Morton, K.C., H. J. Rowlands, and *B. B. Stenham,* for the respondents, were not called upon.

LORD COZENS-HARDY M.R. This appeal is one involving questions of interest, of importance, and of difficulty. If the case had come before us some five years ago, I should certainly have taken time to consider, as I should have desired to put my judgment into somewhat better shape than it can now be. But I cannot pretend not to have considered these questions, as well as I have been able, in the last few years. The last important case that went to the House of Lords is *Herbert Morris, Ld.* v. *Saxelby.* (2) *Saxelby's Case* (2) follows *Mason* v. *Provident Clothing and Supply Co.* (3), and there is another case which was decided by this Court and did not go to the House of Lords—*Eastes* v. *Russ* (4), in which the same principles were laid down. It is argued that no question of public policy arises in this case, and that if there is consideration for the deed the Court will not measure the consideration and the question of public policy has no application. That is a proposition which in

(1) [1891] 1 Q. B. 594.
(2) [1916] 1 A. C. 688.
(3) [1913] A. C. 724.
(4) [1914] 1 Ch. 468.

this Court, in *Saxelby's Case* (1), I endeavoured to refute. The view taken in the House of Lords entirely concurred in that. Now what does that mean? It means that considerations of public policy must be had regard to, and that it is no answer to say that an adult man, as to whom undue pressure is not shown to have been exercised, ought to be allowed to enter into any contract he thinks fit affecting his own liberty of action. I think that is not the law. It seems to me that if as a matter of construction I come to the conclusion that the contract is one which puts the covenantor in the position—I cannot think of a better word at the moment to express my view—of adscriptus glebae, as the villein used to be called in mediæval times, on the ground of public policy the law will not recognize such a thing. No one has a right so to deal with a man's liberty of action as well as his property, and the law says it is contrary to public policy.

Now what is the deed with which we have to deal? It is in some respects the most extraordinary deed it has ever been my fate to read. It is made between a clerk in the city of London and a money-lender—not so described, but he is, as we have been told, a registered money-lender. [The Master of the Rolls then referred to the terms of the deed and continued.]

Now can it possibly be doubted that that is a deed which is contrary to public policy? Is it open for a man in consideration of a sum of cash to bind himself not to leave the house where he is, not to sell any of his furniture and effects in the house or in any future house he may move into, which furniture is not the subject of any charge in favour of the mortgagee; is it open to him to say "Whatever property I may have I will not give any kind of security upon it for any sum of money or for any debt which legally or morally I may desire to pay"? Such a covenant would prevent the man from employing a doctor or a surgeon in the case of illness in his family, and would prevent him from raising money for the maintenance of his wife and children, or for the education of the latter. I think this is a deed which the law must recognize as bad on grounds of public policy of the most well-established kind.

I do not propose to go through the cases which have been cited to us, but there is one passage in the judgment of Bowen L.J.

(1) [1916] 1 A. C. 688.

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in *Davies* v. *Davies* (1) which seems to me to be valuable: "The law of England allows a man to contract for his labour, or allows him to place himself in the service of a master, but it does not allow him to attach to his contract of service any servile incidents." It seems to me that that observation is just as good in a case of this kind, which is a contract for a loan, as it is in the case of a contract for service. It is part of the common law. The law does not allow such a contract to be made. Mr. Compston rather objected to a word which I used at an early stage of the argument when I said that it seemed to me to savour of slavery. Possibly slavery is too strong a word, but it certainly seems to me to savour of serfdom to say "You shall not leave the house in which you are living without my consent; you shall not dispose of a chair or a table in your house on which I have no charge without my consent, and if you do the whole amount of principal and interest will immediately become payable instead of being payable by instalments." I have no hesitation in saying that in my view this is a deed which is contrary to public policy. Then it is said that there is nothing illegal in the assignment of salary. I agree. Salary may be assigned on the principle of the case of *Davies* v. *Davies* (2); not merely arrears of salary due at the date of the assignment, but future payments may also be assigned. The argument goes further. It is said "Treat that as good; never mind what the consideration for it was; the consideration for it according to the deed was upon the terms of the covenants hereinafter contained." I cannot accept that view. I think that you must consider the consideration as one and entire, and that the attempt to say that this is a case in which the doctrine of the divisibility of parts of the deed should be applied is distinctly contrary to the passage in Lord Moulton's judgment in *Mason's Case* (3) to which Scrutton L.J. referred, and is contrary, I think also, to a great many other authorities that might be referred to. The consideration is one and entire. You cannot speculate and say "If part of the consideration had been omitted, if half of the covenants were struck out, if it were left simply a mortgage with the ordinary covenants, if it were treated as an assignment of wages and a covenant to pay, that

(1) (1887) 36 Ch. D. 359, 393. (2) 36 Ch. D. 359.
(3) [1913] A. C. 745.

would be good; therefore strike out and disregard all the other covenants which are made part of the consideration for the deed." I decline to do that. It seems to me it would be of the worst example to allow a money-lender to get his clutches round a clerk and to put him in a position in which he is not allowed to move to another district and become a clerk elsewhere, not allowed to leave his house, however unhealthy it may be, and not allowed to deal with any part of his unincumbered furniture or other property without the leave of the money-lender. It seems to me that the view taken by the Court below is perfectly right, and, this being an action which raises the question, not as between Bunyan and the money-lender, but as between the money-lender and Bunyan's employer, it is of no use for the money-lender to claim payment under a deed which on the face of it is bad on grounds of public policy. For these reasons I think that the view taken by the Divisional Court was perfectly right, and that the appeal must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. I am happy to think that it is very seldom that so oppressive a contract as this comes before these Courts, and I am happy also to think that our decision to-day may put an end to similar transactions in future.

Now the facts are these: In the year 1913 one Bunyan was a clerk in the employment of the defendants, the Millar's Timber and Trading Company, Limited. He was indebted to three money-lenders in small sums of money, in one case 8*l.* 10*s.*, in another 8*l.* 15*s.*, and in another 2*l.* 7*s.* 9*d.* He was also indebted to certain other creditors, three only in number, in small sums of money. He applied to the plaintiff, who is a money-lender, to lend him enough money to pay off those debts. The plaintiff consented to lend him that money and to advance to him—I am looking at the schedule to the deed—4*l.* in cash, 2*l.* 2*s.* for himself, the money-lender, for expenses, to pay to his solicitors the costs of the deed, amounting to 3*l.* 3*s.*, and to pay the first year's premium on a life policy which was effected for the purposes of the loan, those sums amounting to 42*l.* 8*s.* 3*d.* For the payment of that money the plaintiff obtained the execution by Bunyan of the deed in question.

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[The Lord Justice then considered the terms of the deed and continued :] It comes to this, that if the man for some reason thinks that he would rather not remain in the employment of the Millar's Company, but would like to take employment somewhere else, then, unless the lender in whose power he has placed himself consents to that change, he can only make the change on the penalty of having the whole of this money become due at once and bear interest at 60 per cent. per annum. If he has a daughter who wishes to be married and he desires to give her part of the furniture in his house to assist her in furnishing her house, he can only do it under the same penalty. If he finds that his child is ill and it is necessary to employ a doctor and not to pay his fees at once but to obtain credit, he can only do it upon the penalty of having the whole of this money become due. If he finds his residence undesirable for any reason, he cannot change it except on the same penalty. Can it possibly be said that those provisions can be enforceable in any Court in this kingdom ? The man has put himself, one may say, almost body and soul in the power of this money-lender. Even in the most trivial incidents of life he cannot do as he pleases ; he can only act in a way to which this money-lender will consent.

It is unnecessary to read any of the passages which have been referred to in which judges on previous occasions have expressed their view that any contract which tends to impose servile obligations upon any person in this country is void and unenforceable in these Courts. If ever there was a contract which placed a man under servile obligations towards the other contracting party this contract is such a contract.

Then it is said—and this is the only point on which, speaking for myself, I have felt the least difficulty—you can treat the assignment of wages as a separate matter and enforce that assignment or give effect to that assignment, and neglect the other terms of the contract which are objectionable on the grounds I have mentioned. In my opinion the answer to that is this : The assignment is not a separate matter ; the assignment with which we have to deal is not the assignment of an actual debt, not the assignment of a chose in action which is in existence, but the assignment of a chose in action, wages which a man is going to earn,

which may hereafter come into existence. Now the effect of that is nothing more than to create a contractual obligation between the two parties. That was stated by Lord Macnaghten in his speech to the House of Lords in *Tailby* v. *Official Receiver* (1) in these terms: "It has long been settled that future property, possibilities and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified." In other words, the real effect of such an assignment where property is not in existence is that it is carried into effect not because it passes the property, but because it is a contractual obligation binding upon the assignor, and one which can be specifically enforced if the contract and the subject-matter of it are sufficiently definite. Now one has to look at this deed in the light of a contract one term of which is that the borrower will make over to the lender his salary when it becomes due, and it may give the lender a right to require the employer to pay him that salary. For all that, it is a contract, and nothing but a contract, to make over that salary when it becomes due. We find that is one term of a contract which contains a number of other terms, and all those terms, including the one to which I have referred, are part of that which the lender exacts as the security for the money he is going to advance. It is said "You can sever some parts of those terms from the other parts." In certain cases you can; but in a case like this, where the man lends money on a security which consists of a number of obligations by the person who borrows the money, when those obligations are so involved in each other as they are in the present case, and in particular where the breach of any one of those obligations causes the whole of the money which has been lent to become immediately payable instead of payable by instalments, it seems to me then that the lender has himself rendered it impossible to separate one from the other, and that the contract must be looked at as one entire thing, and, that being so, the

(1) 13 App. Cas. 523, 543.

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assignment of the wages is just as much void as any other part of the deed. In my opinion the judgment of the Divisional Court was perfectly right, and I think that this appeal ought to be dismissed.

SCRUTTON L.J. I am of the same opinion, and desire, in view of the importance to the public of the subject-matter of this case, to express my opinion in my own words. The only thing that has made me hesitate as to whether I should do so is that I am doubtful whether I can express my judgment in language of sufficiently judicial moderation in view of the facts of this case. Any judge who has heard criminal business in the city of London knows that one of the great evils of London at present is the system by which money-lenders lend money to clerks who have small salaries in offices in London, and, under the terror of telling their employers that they have lent such money, drive clerks to crime and inflict any amount of evil on their families. When sitting as a judge of the King's Bench Division in what is called their Saturday jurisdiction, when gentlemen bearing royal and noble names pass before one as plaintiffs lending money at very high rates of interest, I have seen a good deal of the ways of money-lenders, but it had not entered into my wildest imagination that any of them could have concocted a document of the nature of that which we have before us in this case, and I am glad that at last the Court has an opportunity of pronouncing an opinion upon it—to which from my experience of money-lenders I do not suppose they will pay any attention whatever.

The case arises in this way: There is a Mr. Bunyan who is a clerk at a small salary in a London office; his salary is under 3*l.* a week. He was in monetary difficulties; he was owing money to three money-lenders and to a solicitor. His only other debts were under 5*l.* to two tradesmen. Mr. Horwood, the plaintiff, who describes himself as a builder, but who appears to be a registered money-lender, lent him money undertaking to pay off or compound with his creditors, and he lent him a sum of 42*l.*, which included 4*l.* to himself, some 7*l.* or 8*l.* expenses of the loan, some 20*l.* to pay off the money-lenders, and some 5*l.* or 6*l.* to pay off what I may call the legitimate debts. His loan was repayable by instalments of

2*l.* a month including 30*l.* for interest, but the whole sum to become payable immediately default was made in any instalment or any breach of the covenants to which I am about to refer; and he took as security the document that we have to consider. The document bound the debtor never to change his residence without the consent of the money-lender; it bound him never to change his employment without the consent of the money-lender; it bound him not to consent to a reduction of his salary without the consent of the money-lender; it bound him not to part with any of his property without the consent of the money-lender; it bound him to incur no obligations on credit without the consent of the money-lender, and to incur no obligation, legal or moral, without the consent of the money-lender, and it appears to me that it is not using overstrained or poetical language to say that it made this unfortunate man the slave of the money-lender.

Now the question comes before us because what might have been expected to happen did happen. The clerk made default in respect of one of the 2*l.* instalments. Thereupon the money-lender gave notice to his employer and now sues his employer for salary due to the clerk after the notice of assignment. The judge in the City of London Court took the view that it was not an absolute assignment. The Divisional Court differed from that view, but took the view which jumps to the eyes on looking at the document that it was contrary to public policy. The money-lender now appeals to this Court against that decision. Now what test has the Court to apply? Mr. Compston, who has argued this case with his usual courage and ability in the face of an adverse Court, began with the case of *Mitchel* v. *Reynolds*. (1) I think myself that we have got long past *Mitchel* v. *Reynolds* (1) in the doctrine of restraint of trade. We have now the judgment of Lord Macnaghten in the *Nordenfelt Case* (2), enlarged as it is and in some respects altered as it is by the two very luminous judgments of Lord Parker in *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (3) and in *Herbert Morris, Ld.* v. *Saxelby*. (4) In seeing whether any restraint of trade is justified we have to look to see whether the restraint is reasonable—reasonable, that is, in

(1) 1 P. Wms. 181.
(2) [1894] A. C. 535.
(3) [1913] A. C. 781.
(4) [1916] 1 A. C. 688.

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reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed while at the same time it is in no way injurious to the public. Lord Parker's valuable criticism of the language of Lord Macnaghten in *Herbert Morris, Ld.* v. *Saxelby* (1) adds to it that for the restraint to be reasonable in the interests of the parties it must afford no more than adequate protection to the party in whose favour it is imposed, and in merely considering the interests of the parties you do not take into account the effect on the public, which is a separate matter.

Now I look at this agreement from this point of view: Is there no more than is necessary for the protection of the money-lender? It seems to me that there is far more than is necessary for the protection of the money-lender in whose interests it is imposed. Is it reasonable in the interests of the public? I can conceive nothing more dangerous to the interests of the public than that a system of money-lending like this to small people in offices where they have great temptations, and great opportunities to be dishonest if money pressure is put upon them, should be allowed to exist for a single minute, and, looking at the agreement as a whole, it seems to me to be quite clear that it goes far beyond what is reasonable for the purpose for which it is imposed. Then it is said "Perhaps we have overreached ourselves; perhaps this very elaborate document now brought to the Court, having been used with oppressive effect on a number of other clerks without being brought to the Court, may be severed, that we can pick out of it some parts which may pass," leaving the number of objectionable features to which I have referred without enforcing them. I read with the greatest sympathy and delight the language of Lord Moulton on this point in *Mason* v. *Provident Clothing and Supply Co.* (2): "My Lords, I do not doubt that the Court may, and in some cases will, enforce a part of a covenant in restraint of trade, even though taken as a whole the covenant exceeds what is reasonable. But, in my opinion, that ought only to be done in cases where the part so enforceable is clearly severable, and even so only in cases where the excess is of trivial importance, or merely technical, and not a

(1) [1916] 1 A. C. 688. (2) [1913] A. C. 745.

part of the main purport and substance of the clause. It would in my opinion be pessimi exempli if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required." I strongly protest when a money-lender has thought fit to have an oppressive document of this sort elaborately framed that the Court should then be astute to say "We can give you a certain part of it although you have asked for far too much." I decline to do so unless obliged by the authorities, and I think for the reasons given by Warrington L.J., with which I concur, that I am not bound to assist the money-lender who has framed this document in putting forward a part of it as enforceable. I quite agree with the judgments delivered by the other members of this Court, and I have the greatest pleasure in delivering this judgment.

Appeal dismissed.

Solicitors for appellant: *Barnes & Butler.*
Solicitors for respondents: *White & Leonard.*

G. A. S.

C. A.
1916
Nov. 30;
Dec. 1.

[IN THE COURT OF APPEAL.]

PRODUCE BROKERS COMPANY, LIMITED *v.* OLYMPIA OIL AND CAKE COMPANY, LIMITED.

Contract—Sale of Goods—Custom of Trade—Inconsistency with Written Contract.

By a contract dated May 30, 1912, the Produce Brokers Company agreed to sell and deliver to the Olympia Oil and Cake Company 6000 tons of Soya beans to be shipped from an Eastern port to Hull. In fulfilment of this contract the sellers on February 4, 1913, declared and appropriated a cargo of beans shipped at Vladivostok on a ship called the *Canterbury* by the East Asiatic Company. This cargo had on February 4 been tendered to and accepted by the sellers under a contract in similar terms by which the East Asiatic Company had sold to them the same quantity of Soya beans. On February 3 the *Canterbury* had in fact met with disaster near Vladivostok, and on February 4 she sank with her cargo. The fact of the loss became known to the sellers on February 4, in the interval between the receipt by them of the tender from the East Asiatic Company and the handing of that tender to the buyers. On an arbitration between the parties, it was found by the Board of Appeal of the Incorporated Oil Seed Association that by the custom of the trade, in case of resales, buyers under this form of contract were bound to accept the original shipper's appropriation, if passed on without delay, provided that the original shipper's appropriation was valid and in order at the time of being made by the original shipper to his buyers; and that their sellers would be under no obligation to make any appropriation other than that of passing on a copy of original shipper's appropriation without delay, even though the said appropriation at the time of being passed on might, apart from such custom, be invalid and not in order. It was further found that the appropriation in question by the sellers was made under a resale to which the custom applied, and that the appropriation of the original shippers, the East Asiatic Company, was valid and in order. The arbitrators awarded that the buyers were bound to accept the sellers' appropriation, although at the time it was made the cargo was at the bottom of the sea. On motion by the buyers to set aside the award the Divisional Court held that the custom was neither unreasonable nor inconsistent with the contract, and dismissed the motion:—

Held by the Court of Appeal, before whom it was not contended

that the custom was unreasonable, that it was not inconsistent with the contract, and that the award must consequently stand.

Decision of the Divisional Court [1916] 2 K.B. 296 affirmed.

APPEAL from the decision of a Divisional Court (Horridge and Rowlatt JJ.). (1)

The decision appealed from was given upon a motion by the Olympia Oil and Cake Company, Limited, to set aside two awards in an arbitration between that company and the Produce Brokers Company, Limited. The motion was based upon four grounds, the first of which was that each of the awards was bad on the face of it or wrong in point of law. When the motion originally came on for hearing the second, third, and fourth grounds were alone dealt with, and ultimately it was decided by the House of Lords (2) that the motion ought to be dismissed as regards those three grounds, leaving the first ground to be disposed of by the Divisional Court. The facts of the case are fully stated in the report of the proceedings in the House of Lords, and also in the report of a decision of the Divisional Court on a special case stated by the arbitrators: see [1915] 1 K. B. 233.

Shortly stated, the question in the arbitration arose out of a contract contained in a printed form issued by the Incorporated Oil Seed Association, by which the sellers, the Produce Brokers Company, sold to the buyers, the Olympia Oil and Cake Company, 6000 tons of Soya beans. In fulfilment of this contract the sellers on February 4, 1913, declared and appropriated a cargo of beans shipped at Vladivostok on a ship called the *Canterbury* by the East Asiatic Company. This cargo had on February 4 been tendered to and accepted by the sellers under a contract in similar terms by which the East Asiatic Company had sold to them the same quantity of Soya beans. On February 3 the *Canterbury* had in fact met with disaster near Vladivostok, and on February 4 she sank with her cargo. The fact of the loss became known to the sellers on February 4, in the interval between the receipt by them of the tender from the East Asiatic Company and the handing of the tender to the buyers.

The Board of Appeal of the Incorporated Oil Seed Association,

(1) [1916] 2 K. B. 296. (2) [1916] 1 A. C. 314.

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by their award dated June 25, 1914, affirmed an award of the umpire dated May 17, 1913, and found :—

1. That by the long-established and well-recognized custom of the trade, in case of resales, buyers under this form of contract impliedly agree with their sellers (*a*) that they will accept the original shipper's appropriation, if passed on without delay, provided that the original shipper's appropriation was valid and in order at the time of being made by the original shipper to his buyer; and (*b*) that their sellers shall be under no obligation to make any appropriation other than that of passing on a copy of original shipper's appropriation without delay, even though the said appropriation at the time of being passed on might, apart from such custom and implied agreement, be invalid and not in order.

2. That the appropriation in question by the sellers was made under a resale to which the custom applied.

3. That the appropriation of the original shipper, the East Asiatic Company, was valid and in order.

The arbitrators therefore awarded that the buyers were bound to accept as a valid appropriation under the contract the copy of the original shipper's appropriation passed on to them by the sellers.

The Divisional Court held that the custom was not unreasonable and not incompatible with the written contract, and dismissed the motion. The buyers appealed. On the hearing of the appeal it was not contended that the custom was unreasonable, but that on the face of the award there was an incompatibility between the contract and the custom.

Leslie Scott, K.C., and *C. R. Dunlop*, for the appellants. The custom is inconsistent with the contract. The true criterion is whether it is inconsistent with the whole contract, not merely with one provision. It is necessary first to construe the contract and then see whether the custom is consistent with the whole of it. Under the contract there is an obligation upon the seller to deliver the goods to the buyer in this country, no property passing until delivery. The risk, therefore, until delivery, is upon the seller, and his obligation being to deliver, he cannot fulfil it unless he declares a ship afloat, to which clause 10 can apply. Such a custom as is found here is inconsistent with the fundamental

character of a contract for the sale of unascertained goods: *Karberg & Co.* v. *Blythe & Co.* (1) The essence of the contract is to deliver the goods at a port in this country. The seller cannot get rid of his obligation by virtue of a custom which is inconsistent with the main object of the contract: *Hutton* v. *Warren.* (2)

It is not now contended that there is anything commercially unreasonable in the custom, but legally it is incompatible with the contract. Where there is a contract for the delivery of goods it cannot be said that a custom, which enables the seller to get rid of his obligation to deliver by declaring a ship that has already gone to the bottom, is consistent with the contract.

[SCRUTTON L.J. Why is a custom which defines a good declaration inconsistent with the contract?]

If a seller desires to have an exception relieving him from the obligation to deliver the goods it must be expressed in clear language. In the absence of that the contract will not be so construed. The contract as it stands is (*a*) to deliver goods, and (*b*) to declare a ship (clause 3). It is not permissible to read into that contract an implied term relieving the seller from his obligation.

Leck, K.C., and *F. D. MacKinnon, K.C.*, for the respondents. The custom is not inconsistent with the contract. In applying the law under the Sale of Goods Act to the sale of goods over the sea it is necessary to be careful lest the application be too literal. This is not a contract to deliver goods in a deliverable state. It does not put the whole risk of the voyage upon the seller. The meaning of the contract is that when a seller has received a good declaration he may hand it on to the buyer, and if the ship is lost, whether before or after the declaration, the seller is to be held to have fulfilled his obligation. In *Humfrey* v. *Dale* (3) evidence of a custom was held admissible as not contradicting the written instrument but explaining its terms, or adding a tacitly implied incident. "To fall within the exception of repugnancy, the incident must be such as if expressed in the written contract would make it insensible or inconsistent": per Lord Campbell C.J. That applies here, for if the customary provision had been written into this contract there would have been no inconsistency.

(1) [1915] 2 K. B. 379. (2) (1836) 1 M. & W. 466, 476.
(3) (1857) 7 E. & B. 266, 275.

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Dunlop in reply. The real point in this case is whether a seller can declare against the contract a ship and cargo which to his knowledge are not in existence at the time of his declaration. The Divisional Court have decided that he cannot, and the arbitrators have adopted that answer. That being so, can a custom enable a seller to pass on as a valid appropriation that which under the written contract is invalid ? A custom of that kind goes to the root of the contract and destroys the object of it. This is a contract to deliver goods at their destination—it may be partially damaged. The clause as to declaration is merely ancillary. The object of appropriation is not to enable the contract to be put an end to, but to be carried out. It is an essential condition in a contract to deliver goods that the goods should be in existence when the seller purports to do that which is necessary to fulfil his obligation. The custom goes to the root of the contract and is inconsistent with its scope and motive. The appeal should be allowed.

SCRUTTON L.J. The other members of the Court have asked me to give judgment first in this case.

This is an appeal by the Olympia Oil and Cake Company, Limited, from a decision of the Divisional Court composed of Horridge J. and Rowlatt J., who have held that an award of the Board of Appeal of the Incorporated Oil Seed Association is valid. This case has a very lengthy and troublesome history. I quite agree, if I may respectfully say so, with the remarks of Lord Loreburn when this case reached the House of Lords, that it is a terrible example of the disadvantages of combining a commercial arbitration with proceedings in the Courts. Any one who is acquainted with commercial matters knows that side by side with the proceedings in the Courts there has grown up a very extensive system of settling commercial disputes by arbitration by commercial men themselves. No better example can be found of the extent to which that has gone than the statement in one of the affidavits in this case that in this particular trade in the year 1913 over 6000 disputes were disposed of by commercial arbitration in the city of London alone.

Now in this case what has happened is this, and I state it in order to explain the exact point that we now have to determine. There was a contract on May 30, 1912, by which the Olympia Oil and

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Cake Company, Limited, bought of the Produce Brokers Company, Limited, 6000 tons of Soya beans to be shipped at an Oriental port or ports during December, 1912, and/or January, 1913, by steamer direct or indirect to Hull at a price per ton gross weight ex ship. There are certain other provisions that I need not at present read. The Produce Brokers Company, Limited, had bought a cargo complying in date and in quantity with the terms of that contract from the East Asiatic Company, and they received, less than forty days from the date of the bill of lading, an appropriation of that cargo by the ship *Canterbury* to the contract which they had with the East Asiatic Company. On February 4 the *Canterbury* was lost, and on that day, knowing of the loss, the Produce Brokers Company, Limited, declared the cargo by the *Canterbury* under their contract to their buyers, the Olympia Oil and Cake Company, Limited. The buyers took the view that the sellers could not declare a cargo which they knew to be lost at the time it was declared, and the matter, as provided by the contract, went to arbitration before the Incorporated Oil Seed Association, first of all to three arbitrators, and then on an appeal to the Board of Appeal of that association. The Board of Appeal of the association, being asked to do so in the course of the proceedings, stated for the opinion of the Court in its consultative jurisdiction a special case in which they asked certain questions, the first of which was whether, having regard to the terms of the contract of May 12, a tender or appropriation under clause 3 could validly be made if at the material time, and whether to the knowledge of the sellers or not, the vessel and her cargo had already become a total loss. That special case came before the Divisional Court of the King's Bench, composed of my brothers Avory, Rowlatt, and Shearman. The case is reported. (1) My brothers Avory and Shearman took the view that you could not make a declaration if the goods were lost, whether you knew it or not. My brother Rowlatt declined to express an opinion as to what would happen if you made a declaration and at the time did not know the goods were lost. He agreed that if you knew they were lost it could not be a good declaration. The special case stated nothing about customs of trade, and the decision was a decision as to the construction of the contract. The special case,

(1) [1915] 1 K. B. 233.

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therefore, was sent back to the Board of Appeal of the Association answering the first question in the negative—that is, that such a tender or appropriation could not be validly made. The next step was that the Board of Appeal made their award in which they stated that they unreservedly accepted the decision on the construction of the contract; but they found that there was a custom of trade that buyers should accept the original shipper's appropriation if passed on without delay, provided that the original shipper's appropriation was valid and in order at the time of being made by the original shipper to his buyer, and then that their sellers should be under no obligation to make any appropriation other than that of passing on a copy of the original shipper's appropriation without delay, even though the said appropriation at the time of being passed on might, apart from such custom and implied agreement, be invalid and not in order. Thereupon the buyers took this position. In effect they said to the arbitrators: "You say you are unreservedly accepting the answers, but what in fact you are doing is to snap your fingers at them by finding a custom of trade which renders them of no use, and we say you cannot find such a custom of trade." The buyers accordingly came to the Divisional Court for the second time to set aside the award as invalid inasmuch as it relied on a custom which contradicted the contract. The Divisional Court was hampered or assisted, whatever language you like to use, by two decisions of the Court of Appeal—*Hutcheson & Co.* v. *Eaton & Son* (1) and *In re North Western Rubber Co. and Hüttenbach & Co.* (2), which had in effect said that arbitrators acting on a contract must deal with the contract only and could not take into account or find a custom which modified the contract. The Divisional Court were of course bound by those two decisions of the Court of Appeal, and they therefore said "it is not for the arbitrators to find this custom. We will follow the precedent established in *Hüttenbach's Case* (2), and we ourselves will hear evidence on affidavit and cross-examination to ascertain whether there is such a custom or not. Meanwhile we do not know whether or not the award is valid until we have ascertained whether there is such a custom." The case then went to the Court of Appeal.

(1) (1884) 13 Q. B. D. 861. (2) [1908] 2 K. B. 907.

The Court of Appeal, in a judgment as to which I must respectfully say I have never seen the like of it before, said, not in effect, but in terms, "We are going to give a judgment which we know is wrong, and we set out the reasons why it is wrong, but we are bound by the two decisions of our own Court in *Hüttenbach's Case* (1) and in *Hutcheson & Co.* v. *Eaton & Son* (2) to give the judgment which we do give, and which we proceed to explain is wrong for a series of reasons which we give, which judgment is that it is not for the arbitrators to find the custom and that the decision of the Divisional Court to hear evidence to determine the custom is correct." That was the third proceeding that had been in the High Court so far. An appeal was taken to the House of Lords (3), and the House of Lords, being at liberty to deal with *Hutcheson & Co.* v. *Eaton & Son* (2) and with *Hüttenbach's Case* (1), said: "We entirely adopt the reasons of the Court of Appeal in this case. We agree that their judgment was wrong for the reasons that they themselves gave, and we therefore reverse the decision of the Divisional Court"—that is to say that the Divisional Court would hear and determine whether there was a custom. "It must be taken that there is such a custom, and we again remit the question whether the custom is contradictory to the contract or can be proceeded upon to the Divisional Court." We have now had four hearings in the High Court. Then came the fifth hearing in the High Court. When the matter came back to the Divisional Court for the third time (4), the points taken before them being that the custom contradicted the contract, that the custom was unreasonable, and that by reason of certain facts alleged to be in the special case the custom was not applicable to the contract, and consequently that the award was bad, the Divisional Court held that the award must stand. Whereupon the buyers appealed to this Court, and it now comes for the sixth time before the High Court, having been twice before the courts of the Incorporated Oil Seed Association, in order to ascertain whether the judgment of the Divisional Court that the custom as found does not contradict the written contract is or is not a good decision. The obvious comment that I make is the one that Lord Loreburn made, that this is a very expensive cargo of Soya beans,

(1) [1908] 2 K. B. 907.
(2) 13 Q. B. D. 861.
(3) [1916] 1 A. C. 314.
(4) [1916] 2 K. B. 296.

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because besides the original price it has now had to stand the expense of six hearings in the High Court and of two hearings before the Incorporated Oil Seed Association. Having recited these facts, I again respectfully agree with Lord Loreburn's remark that to decide a dispute in this way by a combination of commercial men and the High Court is about the very worst way that you could do it. But we have to do it. Our labour is a little lightened in this case by the fact that, whereas before the Divisional Court it was argued that the custom was unreasonable, Mr. Leslie Scott, for the buyers, in this Court has given up that contention, and indeed, considering that it is obvious in view of the affidavit of the Incorporated Oil Seed Association that a large number of commercial people act upon this custom, it was a little difficult for judges to hold that the course of procedure followed by commercial men was unreasonable.

Now the question which we have to consider is whether the custom as found by the arbitrators contradicts the written contract. The point that the award is bad because certain alleged facts in the special case show it is bad has been practically abandoned by Mr. Dunlop on the production of a document which shows that he cannot rely on the alleged facts. Therefore it comes simply to the question, Is the custom alleged one which contradicts the written contract and which, therefore, cannot be relied upon or given in evidence? I think it is first of all necessary to try and understand on this point what the original contract means in order to see whether the custom contradicts it. Mr. Leslie Scott has not argued that the custom contradicts any particular clause of the contract, so that if the two were read together they would appear to be inconsistent, but, as I understand him, he says that the custom is inconsistent with the scheme or the tenor of the contract. Now the contract itself is this. A cargo of beans is to pass from seller to buyer at an English port, payment on delivery, but if you ask what cargo of beans it is, it is a cargo which is to have been shipped at an Oriental port during a named date, and therefore some time before it is delivered. There is therefore a period between the time when the cargo is shipped and the time when it is delivered, during which it will be at the risk of sea perils, and you will consequently expect that there should be some provisions showing who is to bear the risk of sea

perils involving total loss of the cargo, involving partial loss of the cargo, involving damage to part of the cargo, and involving loss of profits on cargo. The mere shipment of the cargo does not appropriate it to the contract; that is to say, a man who has sold a cargo, supposing that the original seller to him had shipped a cargo at the Oriental port during the named period, would not by that fact alone be bound to deliver it under this contract, and you would consequently expect, if you were familiar with commercial transactions, that there might be some provisions by which the seller was either bound to or might during the voyage or at the time of shipment appropriate the cargo to the contract, not in the sense of passing the property in the cargo, but in the sense of binding himself to deliver that cargo against that contract. You find in the contract a provision that particulars of shipment with date of bills of lading be declared by original sellers not later than forty days from the date of the last bill of lading. Now where the party to this contract, the seller, is himself the shipper, he would absolutely be bound under that clause to make the declaration within forty days from the date of the last bill of lading, and the effect of that clause in this contract appears to be that where the seller is not the original seller or the shipper, if he is bound to declare, or if he is under any duty to declare, he must declare a cargo which fulfils the description given that the original seller has declared it within forty days of the date of the bill of lading. This contract does not in terms say anything about a seller declaring who is not the original seller, but it assumes that such a declaration will be made, for it says "The buyer shall have at least three clear days after appropriation," which can only be appropriation by declaration under the contract, "to give the necessary orders for the port of destination at the port of call." Then it goes on "in case of resales"—that is to say, where there is a sale of something which has been already sold; that is to say, where the seller under this contract is selling something which he has already bought—"a copy of the original appropriation shall be accepted by buyers if passed on without delay." Now it is not necessary in this case to decide what I am about to say; but my own strong impression is that on the true meaning of this contract without any custom, where a seller under the contract has received an appropriation from an original buyer, this clause binds the buyer under

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that contract to accept that declaration, whether the cargo is lost or not. When in the case of *Karberg & Co.* v. *Blythe & Co.* (1) I had to consider the effect of the first decision of the Divisional Court (2), I was then in a position in which I was bound, as a judge of the King's Bench, by the decision of the Divisional Court, and I there said that the case was binding on me on the point to be decided. I am not now in a position where I am bound by the decision of the Divisional Court, and I should like to state my strong impression that, for the reasons I have given on the particular point which the Court would have to decide as to the meaning of that particular clause in the case of resale, the decision of the Divisional Court (2) was wrong. But, as I say, it is not necessary to decide this, because the question in this case is whether, supposing the view of the Divisional Court on the meaning of the contract without the custom is right, the custom found by the arbitrators is inconsistent with the contract or not, or so contradictory of it that it cannot be brought forward.

The rule as to whether evidence of a custom is admitted to vary a written contract is perhaps easier to state than to apply, because in a sense any admission of custom varies a written contract. The contract construed without the custom will be different from what it is if construed with the custom, and in that sense every admission of custom varies the written contract. That is pointed out by Lord Campbell in a passage which has been read in *Humfrey* v. *Dale* (3), where he points out what I have just been stating, that if by the side of the written contract without the added incident you write the same contract with the added incident, the two would seem to import different obligations and be different contracts. But it is quite clear that, though the meaning of the written contract is varied, you may use the custom first of all in the case where you are using the custom as a dictionary to explain what words in the contract mean; where the contract says "twelve" you may show that by custom "twelve" means "thirteen" (a baker's dozen), and where the contract says "one hundred" you may prove by custom that "one hundred" means the long hundred (one hundred and twenty), and where the contract says "payment at thirty days,"

(1) [1915] 2 K. B. 379. (2) [1915] 1 K. B. 233.
(3) 7 E. & B. 275.

as in the case of an ordinary bill of exchange or promissory note, you may prove that thirty days means thirty-three days, or that three months means three months and three days. You may use the custom to define places. "Alongside" without a custom may mean a certain area, and "alongside" with a custom may mean a much larger area. You may use custom to define method of performance. The method of performance without the custom might be limited to certain means and the method of performance with the custom might be much wider. In my view you may justify the use of the custom proposed in this case in several ways, which, though they vary the meaning of the written contract, do not contradict it in the sense in which Lord Campbell points out that the custom might be inadmissible. One of the ways in which I think you may use it is in the way already suggested by Warrington L.J. Clause 10 provides: "This contract is to be void as regards any portion shipped that may not arrive by ship or ships declared against this contract." What is the meaning of "ship or ships declared against this contract"? May you declare a ship against this contract which is lost at the time you declare it? By custom of trade you may do so if you are not the original seller, but a seller who has bought, and you are declaring a ship which has been declared to you by the original seller. I think also you may perhaps use it as explaining a sentence in clause 32, "Copy of the original appropriation shall be accepted by buyer"; that is to say that it is a good appropriation, though the ship and cargo that you are appropriating are lost, if you have had them declared to you by original buyers. It is a little difficult for me to express why I think the custom is not contradictory of the original contract, because I am of opinion that the original contract in all probability means the same as the custom, but, taking the view of the first Divisional Court (1) that without the custom the contract means what they say it does, in my view the custom is admissible, not contradicting the contract; varying its meaning, it is true, but varying its meaning by explaining what will be a good declaration. That is, I think, substantially the line taken by the Divisional Court. I am of opinion that the result they have arrived at is right for the reasons that I have stated, and I think there is

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always a satisfaction when the Courts construe a business document in the way in which business men themselves construe it.

For these reasons I think the appeal fails and should be dismissed with costs. This is the sixth hearing in the High Court, and I hope it will be the last, but still there are possibilities.

LORD COZENS-HARDY M.R. I agree in the judgment that has been delivered by my brother.

WARRINGTON L.J. I agree.

Appeal dismissed.

Solicitors for appellants: *W. A. Crump & Son, for Andrew M. Jackson & Co., Hull.*

Solicitors for respondents: *Waltons & Co.*

G. A. S.

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Dec. 6, 7.

KIRKLINTON *v.* WOOD.

Landlord and Tenant — Covenant to repair — Covenant to do Specific Repairs in a Particular Year—Notice by Lessee to terminate Lease during Currency of Year—Liability of Lessee under the Covenant.

Where a lease contains a covenant to execute specific repairs in a particular year, if the lease shall be then subsisting, the obligation to perform the covenant attaches as soon as the year begins, and the fact that the lease is determined by the lessee by notice expiring before the end of the year does not relieve the lessee of his obligation to perform the covenant.

A lease contained (inter alia) the following covenant by the lessee: "And will in the year 1909, and also in the year 1916, if this lease shall so long last paint varnish and grain all the inside wood and iron work usually painted varnished or grained of the said demised premises with three coats of good oil and white lead paint in a proper and workmanlike manner."

The lessee died in 1915, and his executors, under a power in that behalf contained in the lease, gave six months' notice to the lessor to determine the lease on March 1, 1916. On the determination of the term, the covenant not having been performed, the lessor claimed damages for the breach of it:—

Held, that the executors were liable.

SPECIAL CASE stated by an arbitrator.

By a lease dated March 26, 1904, between George Graham Kirklinton of the one part and Joseph Edmund Carter Wood of the

other part, the mansion-house and premises known as Kirklinton Hall in the county of Cumberland were demised by G. G. Kirklinton to J. E. Carter Wood for a term of twenty-one years from March 1, 1904. The lease contained the following clause: "Provided also and it is hereby also agreed that if the lessee shall during the continuance of the term hereby granted die and if the executors administrators or assigns of the lessee or the lessor respectively shall be desirous of determining the present lease then if the executors administrators or assigns of the lessee shall give to the lessor six calendar months previous notice as aforesaid to determine this present lease on the first day of March in any year of the said term or if the lessor shall give six calendar months previous notice in writing to determine this present lease on the first day of March in any year of the said term to the lessee's executors administrators or assigns then and in either of such cases immediately after the expiration of such six calendar months notice this present demise and everything herein contained shall cease and be void but subject to the rights and remedies of the lessor and lessee in respect of the rents in arrear or breach of any of the lessor's or lessee's covenants." It also contained a covenant by the lessee that he would throughout the term well and sufficiently repair the buildings and premises thereby demised and a covenant in the words following: "And will in the year 1909, and also in the year 1916, if this lease shall so long last paint varnish and grain all the inside wood and iron work usually painted varnished or grained of the said demised premises with three coats of good oil and white lead paint in a proper and workmanlike manner."

The lessee died in 1915, and his executors, in accordance with the power contained in the lease, gave the lessor six months' notice to terminate the lease on March 1, 1916. On the determination of the term a claim was made on behalf of the lessor against the executors of the lessee for breach by them of the covenants in the lease to repair and to paint, varnish, and grain the inside wood and iron work with three coats of good oil and white lead paint in a proper and workmanlike manner in the year 1916. The lessee's executors denied liability, and the whole of the lessor's claim was by agreement dated May 1, 1916, referred to arbitration. The agreement provided that it was a submission to arbitration within the

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Arbitration Act, 1889, and contained a provision that on the request of the lessee's executors and the lessor or either of them the umpire should state his award as to any part thereof in the form of a special case for the opinion of the Court. The umpire was requested to state his award as to the extent of the liability of the lessee to the lessor under the covenant as to painting, varnishing, &c., in the year 1916 in the form of a special case for the opinion of the Court, and he found the following facts :—

(*a*) That the said lease lasted until the 1st day of March, 1916, upon which date it was determined by six calendar months' prior notice in writing given by the executors of the lessee, pursuant to the provisions thereof.

(*b*) That no painting, varnishing, or graining pursuant to the said recited covenant was executed by the said executors during the period from the commencement of the year 1916 up to the date of the determination of the said lease.

The question for the opinion of the Court was whether the lessee's executors were liable for breach of the said recited covenant to paint, varnish, and grain all the inside wood and iron work in the manner therein mentioned in the year 1916.

Eustace Hills, for the lessor. The lessee was bound, in addition to painting, varnishing, &c., in the year 1909, to paint, varnish, &c., in 1916, because the lease had extended into and over part of the year 1916. Under the covenant the years 1909 and 1916 were specially agreed upon as the years for painting because there would be deterioration in the wood and iron work if the repairs specified were not carried out in the years mentioned in the covenant. The covenant provided for certain repairs to be executed in 1909 and in 1916, and the fact that certain repairs had been executed in other years did not affect the lessee's obligation to perform the covenant in 1916. It was, of course, open to the lessee's executors to continue the lease and enjoy any benefit arising from the execution of these repairs. But it was their own fault that they had deprived themselves of that benefit by determining the lease when they did. There was a direct and clear covenant by the lessee to carry out the specified repairs in 1916. The obligation under the covenant attached as soon as the year 1916 began and continued during the

period from January 1 to March 1, and inasmuch as the executors have gone out of possession without having performed the covenant, the executors are liable in damages for breach of covenant.

E. W. Lavington, for the lessee's executors. There was no obligation on the lessee to execute these repairs in 1916, because the lease ended in March, 1916. The covenant contemplated that the lease should subsist during the whole of 1916, before the obligation arose. It is true that the lease has lasted into the year 1916, but the meaning and effect of the covenant on the part of the lessee was that he should have the whole of the year 1916 in which to perform the covenant; there was therefore no breach until the year 1916 came to an end. Inasmuch as, pursuant to the power reserved to the lessee in the lease, the lease was determined before the year 1916 came to an end, there is no liability on the part of the executors.

Dec. 7. LUSH J. A dispute has arisen between the lessor and the executors of the lessee as to the liability of the executors to perform a certain covenant in the lease, or to pay damages for breach of the covenant. The lease was dated March 26, 1904. The parties to it were Mr. Kirklinton of the one part and a Mr. Joseph Carter Wood, the lessee, of the other part. The lease provided that if the lessee should during the continuance of the term die, and if his executors should give to the lessor six calendar months' notice to determine the lease on March 1 in any year of the term, or if the lessor should give six calendar months' previous notice in writing to determine the lease on March 1 in any year to the executors, then and in either of such cases immediately after the expiration of the notice the demise should cease. The lessee died in the year 1915, and his executors gave notice, pursuant to that power, to determine the lease on March 1, 1916. The lease contained the usual covenants on the part of the lessee to pay the rent and keep the premises in repair, and there were other covenants with regard to the furniture; and then comes this covenant, upon which this dispute has arisen: "The lessee will in the year 1909, and also in the year 1916, if this lease shall so long last paint varnish and grain all the inside wood and iron work" and so on —a covenant to do certain painting and decorative work. The lease came to an end on March 1, 1916; and the lessor contends that the executors of the lessee are bound by

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that covenant, and, not having observed it, are bound to pay damages for its breach.

The ground of the contention on the part of the lessor is that, inasmuch as the lease has lasted into the year 1916, the executors came under an obligation to perform that covenant, and inasmuch as they have not performed it, and have gone out of possession and the lease has come to an end, they must pay damages for the breach of the covenant. The executors of the lessee, on the other hand, contend this: "True it is that the lease has lasted into the year 1916; but the meaning and effect of the covenant on the part of the lessee was that he should have the whole of the year 1916 in which to perform the covenant, that there was therefore no breach until the year 1916 came to an end, and that inasmuch as, pursuant to the power reserved to the lessee in the lease, the lease was determined before the year 1916 came to an end, there is no liability on the part of the executors." In my opinion the contention of the lessors is the correct one. It is quite true that if the lease had not been determined there would have been no breach on the part of the executors of the lessee on the date in question, namely, March 1, 1916; but none the less there was an obligation on the executors of the lessee, as soon as the year 1916 commenced, to perform that covenant, and inasmuch as the executors of the lessee, by giving that notice, put it out of their power to perform the covenant after March 1 they cannot contend that they were not under an obligation to perform it during the period that intervened between January 1 and March 1. The executors, by giving the notice, shortened the period during which they had the opportunity of doing the painting and performing the covenant. It seems to me quite impossible for them, having taken that course, to say that they had the whole of the year 1916 in which to perform it, and that therefore there was no breach on March 1. The case was put in argument as to what would have happened if the lessor had given the notice. I do not think it is necessary for me to consider what would have been the case if that had happened. It is not what did happen. The lessee's executors gave the notice, and in my opinion, the obligation having attached to them as soon as the year 1916 commenced, they were bound to perform it or to show some excuse for their non-performance. They have not performed it;

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they have given no excuse for their non-performance. Therefore I think the executors are liable on the covenant. The arbitrator in his award, which is stated in the form of a case, simply left it to the Court to say whether the lessor is right or wrong in his contention. My answer, therefore, is that the lessor is right, and that the executors of the lessee are liable for breach of the covenant.

Judgment for the lessor.

Solicitors for lessor: *Harrison, Powell & Tulk, for K. J. Hough, Carlisle.*

Solicitors for executors of lessee: *Gray, Mounsey & Fuller, for Mounsey, Bowman & Graham, Carlisle.*

J. F. C.

HEALY *v.* HOWLETT & SONS.

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Dec. 8, 11.

Sale of Goods—Appropriation to Contract—Passing of Property.

The plaintiff, a fish exporter carrying on business at Valentia, Ireland, entered into a contract with the defendants, fish salesmen, of Billingsgate, to sell to them twenty boxes of hard, bright mackerel. The fish were to be sent to the defendants at Billingsgate. On the same day the plaintiff consigned by railway from Valentia to his (the plaintiff's) order in Holyhead 190 boxes of mackerel, and telegraphed instructions to the railway company at Holyhead to deliver twenty of the 190 boxes to the defendants, and of the remaining 170 boxes twenty and 150 to two other consignees respectively. After the mackerel were placed on rail at Valentia the plaintiff sent to the defendants by post an invoice on which he placed the words "At sole risk of purchaser after putting fish on rail here." The train in which the mackerel were carried from Valentia to Dublin was delayed and arrived at Dublin so late that the mackerel lost the boat by which they ought to have been carried from Dublin to Holyhead. Upon arrival of the 190 boxes at Holyhead an official of the railway company, in accordance with the plaintiff's telegraphic instructions, picked out and earmarked twenty boxes for delivery to the defendants and twenty and 150 boxes for delivery to the two other consignees respectively. In consequence of the delay which had occurred, when the mackerel reached the defendants in London they were not in a merchantable condition as hard, bright mackerel, and the defendants refused to

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accept them. In an action brought by the plaintiff to recover the price :—

Held, that as the invoice was not sent by the plaintiff until after the contract of sale was complete and the fish were put on rail, it was not part of the contract, and therefore did not operate so as to place the fish at the risk of the defendants.

Held, further, that, as there had been no appropriation of the twenty boxes to the defendants at Valentia, the delivery there to the railway company of the 190 boxes did not pass the property in any particular twenty boxes to the defendants, and that they were not bound by the selection and earmarking made at Holyhead after the delay had occurred; consequently the defendants were entitled to reject the mackerel, and the plaintiff could not recover the price from them.

Stock v. *Inglis* (1882) 9 Q. B. D. 708; (1884) 12 Q. B. D. 564; (1885) 10 App. Cas. 263, commented upon and distinguished.

APPEAL by the defendants from a judgment of the judge of the City of London Court.

The action was brought by the plaintiff, Healy, a fish exporter, of Cahirciveen, county Kerry, Ireland, against the defendants, fish salesmen carrying on business at Billingsgate Market, London, to recover 26*l.* 7*s.* 6*d.*, the balance of the price, 30*l.* 15*s.*, of twenty boxes of mackerel.

The fishing industry in this part of the county of Kerry is carried on at Valentia Harbour, about three miles from Cahirciveen, and Valentia Harbour is a terminus of the Great Southern and Western Railway of Ireland.

On January 15, 1916, the plaintiff by telegram entered into a contract with the defendants (the first transaction which had taken place between them) to sell to the defendants twenty boxes of hard, bright mackerel for the price of 30*l.* 15*s.* The telegrams of January 15 by which the contract was made were (so far as material) as follows: The plaintiff telegraphed to the defendants saying that he had 120 boxes of mackerel for sale and asking the defendants to "wire order quick." The defendants telegraphed in reply "Send twenty boxes of hard, bright mackerel." Later on the same day the plaintiff consigned by railway from Valentia to his (the plaintiff's) order in Holyhead 190 boxes of mackerel and wired instructions to the railway company at Holyhead to distribute the fish amongst his various customers in England, including the defendants. The reason Irish fish exporters do business in the way

described above is to prevent rival exporters from ascertaining their customers and the various destinations of the fish they sell. After the mackerel were placed on rail at Valentia the plaintiff posted an invoice to the defendants on which he placed the words "At sole risk of purchaser after putting fish on rail here." The instructions the plaintiff wired to the railway company at Holyhead were that twenty of the 190 boxes were to be delivered to the defendants, and of the remaining 170 boxes twenty and 150 were to be delivered to two other consignees respectively. Upon arrival of the 190 boxes at Holyhead an official of the railway company picked out and earmarked twenty boxes for delivery to the defendants and twenty and 150 boxes for delivery to the two other consignees respectively. It appeared that between Valentia and Dublin the train in which the mackerel were being carried was delayed and consequently arrived at Dublin so late that the mackerel lost the boat by which they ought to have been carried from Dublin to Holyhead, which left Dublin about midday on January 16, and when (having been carried to Holyhead by a later boat) they reached the defendants in London on January 18 they were not in a merchantable condition as hard, bright mackerel, and the defendants refused to accept them. The defendants disposed of them to the best advantage for 4*l.* 7*s.* 6*d.*, which sum they paid to the plaintiff. The plaintiff then brought the action to recover 26*l.* 7*s.* 6*d.*, the balance which he claimed to be due as the price of the fish.

The judge of the City of London Court gave judgment for the plaintiff. In giving judgment he said: "The real issue . . . . is when were the goods at the risk of the buyer. Now the law long before the Sale of Goods Act, 1893, was tolerably clear, but that Act crystallized the law, and s. 32 shows that, where no place for delivery is stipulated for, if the goods are delivered to a carrier that is good delivery. I have no evidence other than that these goods were put on the train at Valentia for the purpose quo usque—that is, to the extent of twenty boxes—for the purpose of transmission to the defendants. It is perfectly true . . . . that they were sent in common with a number of other boxes which were intended for different consignees. It is perfectly true that these particular goods were not earmarked at Valentia as being intended for the defendants, but they were goods—twenty boxes—purchased by

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them although they formed part of a larger consignment intended for other people. There were twenty boxes on that rail intended for the defendants, and it seems to me that the process was to earmark the boxes at Holyhead, and that that was an ancillary and a subordinately ancillary operation, and it did not go to what I call the root of the fulfilment of the contractual obligation. If Holyhead had been the place of delivery I think I should have been constrained to hold that the plaintiff was responsible for the fact that these goods were delivered in a condition, as I think I should find as a fact, which rendered it impossible that they would be in a merchantable state when delivered in London. Therefore the risk would be the risk of the consignor and not of the consignee at Holyhead. . . . . The delivery being at Valentia, and delivery being completed in accordance with my view of the law, I give my judgment for the plaintiff for the amount claimed."

The defendants appealed.

Giveen, for the defendants. Until the twenty boxes of mackerel were appropriated to the contract there was no delivery to the defendants and no property passed to them. The railway company at Holyhead is the plaintiff's agent to earmark and distribute the boxes, and until that is done there are no goods subject to the contract: Sale of Goods Act, 1893, s. 18, rule 5. (1) The plaintiff

(1) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, rule 5:

"(1.) Where there is a contract for the sale of unascertained . . . . goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made:

"(2.) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

reserved the right of disposal by consigning them to his own order. As no goods were being delivered in accordance with the contract until they were appropriated, there was no delivery to the buyers at Valentia within the meaning of s. 32, sub-s. 1, of the Act of 1893. (1) No property passed to them at Valentia, nor were the mackerel at their risk under s. 33 of the Act (1): *Beer* v. *Walker* (2); *Bull* v. *Robison*. (3) Even if the place of delivery was Valentia, there was an implied warranty by the plaintiff that the mackerel should be in a merchantable condition in London so far as ordinary risks of transit were concerned. But they were not in fact or in law delivered at Valentia, and the defendants were entitled to reject the mackerel, which were not delivered till they arrived at Holyhead, and then not in a condition in accordance with the contract. The plaintiff's agent could not by appropriating them to the defendants at Holyhead after the damage had been done pass the property to the defendants or place the risk of loss through the damage upon them. The words on the invoice purporting to place the risk on the defendants formed no part of the contract.

Ellis Griffith, K.C., and *J. A. R. Cairns*, for the plaintiff. There are two questions for decision: (1.) Did the property in the mackerel pass to the defendants? (2.) Were the fish at their risk after being placed on rail at Valentia? As to the risk, *Stock* v. *Inglis* (4) covers the present case and shows that, as the contract was for the fish to be delivered free on rail, the risk was on the defendants. In *Stock* v. *Inglis* (4) the plaintiff could not have recovered against the insurance company unless the goods were at the consignee's risk. There had not been any allocation of the goods in that case, and it is very nearly analogous to the present one. Sect. 32, sub-s. 1, of

(1) Sect. 32, sub-s. 1: "Where, in pursuance of a contract of sale, the seller is authorised or required to send goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer."

Sect. 33: "Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit."

(2) (1877) 46 L. J. (C.P.) 677.

(3) (1854) 10 Ex. 342.

(4) 9 Q. B. D. 708; 12 Q. B. D. 564; 10 App. Cas. 263.

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the Sale of Goods Act, 1893, applies and shows that, as the plaintiff was authorized to send the goods to the defendants, delivery to the railway company at Valentia was delivery to the defendants. In *Stock* v. *Inglis* (1) there was no allocation to the plaintiff until the bags of sugar were lost.

As to the property passing to the defendants, when the mackerel were delivered to the railway company at Valentia the defendants and the two other consignees had from that moment an undivided interest in the goods, and after they arrived at Holyhead each consignee would have been entitled to claim the specific boxes which had been allocated to them if they had chosen to go to Holyhead. That consideration shows that the property had passed to the defendants. [Benjamin on Sale, 5th ed., pp. 355, 356, was also referred to.]

RIDLEY J. This case relates to a consignment of mackerel from Valentia to Billingsgate Market. The contract in question was one for the sale by the plaintiff to the defendants of twenty boxes of hard, bright mackerel to be sent by the plaintiff from Valentia to the defendants at Billingsgate. When the order for the mackerel was received by the plaintiff, the fish, having been caught, were put upon rail at the station, but were not marked with the names of the defendants. The total quantity of mackerel consigned to England by the plaintiff was 190 boxes, of which twenty boxes were to be the defendants'.

With regard to the invoice which was sent by the plaintiff to the defendants, and on which appeared the words "At sole risk of purchaser after putting fish on rail here," in my judgment those words are not a portion of the contract. The contract was complete and the fish were put on rail before that invoice was sent. It is therefore not possible to treat the invoice as part of the contract.

When the fish arrived at Dublin they had been delayed—it does not appear where, but they did not catch the boat by which they were intended to be conveyed to Holyhead. In accordance with the practice of the plaintiff—perfectly reasonable no doubt—at Holyhead twenty boxes were marked for the defen-

(1) 9 Q. B. D. 708; 12 Q. B. D. 564; 10 App. Cas. 263.

dants at Billingsgate. It is contended for the plaintiff that that amounts to an appropriation of those twenty boxes out of the 190 boxes to the purchaser's risk, and that it was an appropriation of the goods within the authorities which establish that where there is a contract for the sale of goods which are not specific the property will pass as soon as there has been an appropriation of particular goods to the contract. The result of those authorities is abundantly clear and is that the goods become the property of the consignee and are at his risk so soon as they are marked off by some distinct act as his, and not the seller's, and are delivered to the carrier as the agent to complete delivery to the purchaser. But in the present instance out of 190 boxes a portion were to belong to the defendants, a London firm, and none had been marked off. I am not aware that in any similar case it has been held that because all the parcels were meant to be divided between three separate purchasers in London there was an appropriation of them all to the risk of the purchasers when it was impossible to say at whose risk any one of the boxes could be. It would follow in the present case that if there was delivery or appropriation, as the learned judge in the Court below put it, up to a certain point, although not completely, at Valentia, some process of lottery or allotment would have to be adopted to decide upon which consignee the loss was to fall if a portion of the goods disappeared and the other portion did not. It is difficult to understand how that could possibly be done. Supposing half the boxes had been lost at sea and the other half were safe, it would be impossible to say whether the boxes which had been lost were the property of the defendants or of one of the other two consignees. In order to bring the present case within the authorities as to appropriation passing the property each box ought to have been marked with the name of its consignee. From that moment the boxes would have remained at the risk of the consignees respectively. That seems to me to be the principle laid down in the Sale of Goods Act, 1893, so far as that statute in terms deals with the matter. Taking the view I do, it is unnecessary to go into the question as to what risks would still have to be borne and by whom. The goods must of course be in a condition good enough to withstand the ordinary risks of transit. It is, however, unnecessary to deal with that point.

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With regard to *Stock* v. *Inglis* (1), which was relied upon on behalf of the plaintiff as showing that there may be appropriation after the goods have been dispatched of such a kind as will pass the risk during transit to the consignee, I think that that case is in several respects a different one from the present. In the first place it is necessary in the present case, in order that the plaintiff may succeed, to show that the goods were at the defendants' risk, but it was not necessary to show that in *Stock* v. *Inglis* (1), because in the result the decision of the House of Lords and of the Court of Appeal was, not that the plaintiff in that case had the property in the goods, but that he had an insurable interest in them. Field J., who tried the case, held that the plaintiff had neither the property nor an insurable interest. But in the Court of Appeal the opinion of Brett M.R. was, as I understand it, that he had an insurable interest although he had not the property, and that it was quite sufficient to give any particular person an insurable interest in the goods if they were put free on board on his account, inasmuch as that is what is meant by the words "free on board." The goods were put on board at the shipper's expense on account of the person for whom they were shipped, and Brett M.R. continued: "in that case the goods so put on board under such a contract would be at the risk of the buyer whether they were lost or not on the voyage." That is a very different point from the question which arises in the present case between the buyer and seller. The question in *Stock* v. *Inglis* (1) was whether the plaintiff had an insurable interest, which he would have in a sense, although the property had not passed from the shipper to him. The same reasoning is contained in the judgments of Baggallay L.J. and Lindley L.J., and although the Earl of Selborne L.C. in the House of Lords undoubtedly used language which leaves scope for argument that he thought that the property had passed (language which has been criticized by the editors of Benjamin on Sale (2)), yet Lord Blackburn most distinctly used language which shows that he did not think so, but that he was deciding that there may be an insurable interest in goods although the whole legal property has not passed. There are insuperable

(1) 9 Q. B. D. 708; 12 Q. B. D. 564, 573; 10 App. Cas. 263.
(2) Vide 5th ed., pp. 355, 356

difficulties in holding that the property has passed in the present case. It is impossible to say which consignee is to bear the loss caused by the deterioration of any particular boxes of the mackerel. The essence of the authorities which decide that appropriation of goods to the contract by delivery to the carrier at the beginning of the transit may be sufficient to pass the property is that it should be known to whom the goods are appropriated, and not that the question as to who is to bear any loss that may happen should be open to any discussion or be determined by accident. That result would follow if the judgment of the learned judge of the City of London Court were upheld. I am of opinion that his decision was wrong and must be reversed.

AVORY J. I have arrived at the same conclusion. The whole question is whether the twenty boxes of mackerel became the property of the buyer, or, in other words, whether they were at the buyer's risk when they were put on rail at Valentia. That depends on whether there was an appropriation of the twenty boxes at that time to the defendants. If there was an appropriation of the particular twenty boxes to them, it is clear that if they and the other purchasers had been at Holyhead when the mackerel in fact arrived there the defendants would have been entitled to say as against the other purchasers "We claim those particular twenty boxes of mackerel." Suppose that in the present case twenty boxes only had become bad, it is quite impossible on the evidence to say which of the various purchasers would have been bound to take the twenty bad boxes when they were at Holyhead. If it was impossible to determine which of the purchasers was bound to take the twenty bad boxes, it follows that no particular twenty boxes were the property of any particular purchaser at that time.

In my judgment the invoice dated January 15, which contains the words "At sole risk of purchaser after putting fish on rail," cannot be construed as part of the contract. There is no evidence of the buyers' assent to those words, and they undoubtedly were placed on the invoice after the contract was made and in my opinion formed no part of it.

I agree that *Stock* v. *Inglis* (1) does not govern the present case,

(1) 9 Q. B. D. 708; 12 Q. B. D. 564; 10 App. Cas. 263, 274.

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though at first sight it might appear to involve the same question That it involved a very different question is I think clear from the language of Lord Blackburn, who said in giving judgment: "I am quite unable to perceive why an undivided interest in a parcel of goods on board a ship may not be described as an interest in goods just as much as if it were an interest in every portion of the goods." That shows that for the purpose of that case all that was necessary to hold was that the plaintiff had as against the insurance company an undivided interest in the parcel of goods which was on board the ship, a totally different matter from deciding that he has the property in a particular twenty boxes out of a consignment of 190, when, as in the present case, nobody can possibly tell which twenty out of the 190 belonged to the defendants and which boxes belonged to the other purchasers. For these reasons I agree that the judgment of the learned judge in the Court below must be reversed.

Appeal allowed.

Solicitor for plaintiff: *H. Z. Deane.*

Solicitors for defendants: *H. Pumfrey & Son.*

J. E. A.

[COURT OF CRIMINAL APPEAL.]

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Nov. 13.

THE KING *v.* NORCOTT.

Criminal Law—Evidence—Indecent Assault—Complaint made by Prosecutrix—Admissibility in Evidence—Prosecutrix persuaded to tell Unassisted Story.

At the trial of the prisoner upon an indictment charging him with having indecently assaulted a female, a girl seventeen years of age, evidence was admitted of a statement in the nature of a complaint against the prisoner's conduct to her, made by the girl to a woman old enough to be her mother, and with whom she was on intimate terms, in answer to questions put by the woman, not of a suggestive or leading character, but which might have had the effect of persuading the girl to tell her unassisted and unvarnished story:—

Held, that the evidence was rightly admitted.

Judgment of the Court (delivered by Ridley J.) in *Rex* v. *Osborne* [1905] 1 K. B. 551 commented on and explained.

APPEAL by the prisoner against his conviction.

The prisoner was tried on October 16, 1916, at the Knutsford Quarter Sessions upon an indictment which charged him with unlawfully and indecently assaulting Florence Mary Hollingworth, a girl seventeen years of age. The girl Hollingworth was the prisoner's illegitimate daughter. On the night of June 26, 1916, at about 11.30, the prisoner came into her bedroom, where she had been in bed since 10 P.M., and got into her bed, saying that he could not sleep in his own room as there was music going on next door. She tried to get away, but the prisoner asked her to stay as he was cold. He then indecently assaulted her. After a struggle she got away from him and went into her sister's bed in the next room, where the sister was sleeping. The sister asked her what was the matter, and she replied, "Hush, and I will tell you in the morning." On the next morning, however, she said nothing to the sister, but on her way to work she called upon a Miss Davies, who was a housemaid and a woman much older than herself, and with whom she was very intimate.

At the trial Miss Davies was called by the prosecution and gave

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evidence to the effect that when the girl Hollingworth called upon her on the morning of June 27, 1916, she seemed very upset. The witness continued: "She had been crying, so I asked her what was the matter with her. She would not tell me, so I asked her why, and she said, 'I do not like, for you will laugh at me if I do.' I said, 'Tell me what it is, Florence,' and she said, 'No; I do not like.' I got hold of her bicycle and said, 'I won't let you go until you do tell me.' I looked the same as I do now. She was not afraid when I told her I should not laugh at her. . . . . She then told me her father came into her room and got into her bed, and that, after some trouble, she got away. . . . . Since then she has lived with me until a few weeks ago, and she has been living with her aunt since then. She was in the habit of calling on me every morning and night before going home. When I got hold of her bicycle I had no idea that she was going to tell me anything like that. She has always taken me into her confidence and told me all her little secrets. When I saw her that morning I knew there was something wrong, or she would not be like that. She has not got a young man, so I knew it was not a quarrel with him." Upon cross-examination the witness said: "I did not think then that it was going to be anything serious. When she said I was going to laugh at her I never expected it to be anything to do with her father. I knew it was something wrong. It is true that I got hold of her bicycle and practically by taking hold of it and by what I said I made her tell me. I did not drag the story out of her, but after she once started I really pressed her to tell me, especially when I heard about the laughing."

The jury returned a verdict of guilty. The prisoner appealed against his conviction upon the ground (inter alia) that the evidence of Miss Davies with regard to the statement made by the prosecutrix to her was inadmissible.

T. E. Morris, for the prisoner. The evidence of Miss Davies was inadmissible. The statement by the prosecutrix to her was not voluntary. It was not spontaneous. Miss Davies held her bicycle and said to her, in effect, "I shall not let you go till you tell me." She also put questions to her. The prosecutrix was therefore induced to make the statement, and Ridley J., in deliver-

ing the judgment of the Court in *Rex* v. *Osborne* (1), laid it down that a statement was not admissible if it was elicited by questions of a leading and inducing character. If Miss Davies had not acted as she did the prosecutrix would probably not have made the statement. [*Reg.* v. *Lillyman* (2) was also referred to.]

A. M. Latham, for the prosecution, was not called upon.

The judgment of the COURT (Viscount Reading C.J., Darling and Atkin JJ.) was delivered by

VISCOUNT READING C.J. The prisoner appeals against his conviction for indecent assault upon his daughter. The ground of his appeal is that evidence of a statement made by the daughter to a Miss Davies, who was a friend of hers old enough to be her mother, was not a voluntary complaint as it was not spontaneous but was induced by questions put by Miss Davies, and was therefore inadmissible within the ruling in *Rex* v. *Osborne*. (3) [Having stated the facts, his Lordship continued :] The point taken on behalf of the prisoner is that the evidence complained of in the present case must, in order to be admissible, come within the rules laid down in *Reg.* v. *Lillyman* (2) and *Rex* v. *Osborne* (3); that there are limitations to the admissibility of evidence of this nature which are stated in the judgment of the Court in *Rex* v. *Osborne* (3), and that the evidence objected to in the present case is not within those limitations and was therefore inadmissible.

It is, of course, very difficult to draw a precise line in these cases. It must depend very much upon the circumstances of each case, but, nevertheless, there is a principle laid down in *Rex* v. *Osborne* (4), where Ridley J. says " the mere fact that the statement is made in answer to a question in such cases is not of itself sufficient to make it inadmissible as a complaint. Questions of a suggestive or leading character will, indeed, have that effect, and will render it inadmissible ; but a question such as this, put by the mother or other person, ' What is the matter ? ' or ' Why are you crying ? ' will not do so. These are natural questions which a person in charge will be likely to put ; on the other hand if she were asked, ' Did So-and-so ' (naming the prisoner) ' assault you ? ' ' Did he do this

(1) [1905] 1 K. B. 551, 561.
(2) [1896] 2 Q. B. 167.
(3) [1905] 1 K. B. 551.
(4) [1905] 1 K. B. 551, 556.

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and that to you ? ' then the result would be different, and the statement ought to be rejected. In each case the decision on the character of the question put, as well as other circumstances, such as the relationship of the questioner to the complainant, must be left to the discretion of the presiding judge." At a later part of the judgment the learned judge said that the judgment of the Court as to evidence of a complaint being admissible applied "only where there is a complaint not elicited by questions of a leading and inducing or intimidating character, and only when it is made at the first opportunity after the offence which reasonably offers itself." It is within those words that it is sought by counsel for the prisoner to bring his case. He does not suggest that the questions put by Miss Davies to the girl were leading, or that there was any intimidation or that the complaint was not made at the first reasonably possible opportunity, but he contends that Miss Davies "induced" the girl to make her statement.

It appears to us that it never was intended that the word "induced" should be interpreted as referring to a statement made by the prosecutrix in answer to a question, or to a question which led her to make her complaint. The Court meant to exclude evidence of a complaint made in answer to questions of a leading or suggestive character. It is obvious why the Court took that view. Evidence of this nature is admitted as being evidence of the consistency of the conduct of the prosecutrix with the complaint made by her, and in that way is regarded as some evidence that her story in the witness-box is probably true. The Court in *Reg.* v. *Osborne* (1) meant to guard against admission in evidence of statements which have been put into the mouth of the prosecutrix by questions of a leading or suggestive character. The Court is concerned to see that in the present case the statement made by the girl was spontaneous in the sense that it was her unassisted and unvarnished statement of what happened. That she may have been persuaded to tell her unassisted and unvarnished story is no reason why the evidence of her having made the statement should be rejected. Consideration of the principles expounded by Ridley J. in the judgment in *Rex* v. *Osborne* (2) to which I have referred shows that that is so. With the view expressed by him this Court

(1) [1905] 1 K. B. 551. (2) [1905] 1 K. B. 551, 556.

is in entire agreement. In the present case Miss Davies stood very much in the position of the girl's mother. She tried to befriend her and get her to tell her what had upset her. But she neither suggested, nor led the girl into making, a statement about the assault, nor did she suggest to her that she had been indecently assaulted. She knew nothing about the assault and tried to get the girl to tell her the reason why she was crying and her story, whatever it was. The evidence is not inadmissible because questions were put to the girl which might have had the effect of persuading her to tell her unassisted and unvarnished story. In our view, therefore, the circumstances of this case bring the evidence within the region of admissibility.

In the judgment in *Rex* v. *Osborne* (1) the following words occur: "If the circumstances indicate that but for the questioning there probably would have been no voluntary complaint, the answer is inadmissible." If that sentence is taken by itself, as we do not think it was ever intended to be, it goes too far. It must be read with the immediately preceding sentences and must be qualified by them. It clearly never was meant that the mere fact of the questioning would make the statement not a voluntary complaint, because Ridley J. had already said that the mother or other person could put such questions as "What is the matter?" or "Why are you crying?"

We desire to guard against its being thought that that sentence is to be taken alone as the judgment of the Court in *Rex* v. *Osborne*. (2) It is only part, not the whole, of the judgment and must be read together with its context.

In our view the evidence complained of by the prisoner was rightly admitted, and therefore this appeal fails.

Appeal dismissed.

Solicitor for prisoner: *Registrar of Court of Criminal Appeal.*
Solicitor for prosecution: *Director of Public Prosecutions.*

(1) [1905] 1 K. B. 551, 556. (2) [1905] 1 K. B. 551.

J. E. A.

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Dec. 1, 2.

HURST *v.* EVANS.

[1916 H. 261.]

Insurance—Loss or Damage—Exceptions—"Theft or dishonesty committed by servant"—Burden of Proof—Evidence.

By a policy of insurance underwriters insured the assured, a jeweller, against loss of or damage to jewellery arising from any cause whatsoever save and except breakage and save and except loss by theft or dishonesty of any servant in the exclusive employment of the assured.

In an action upon the policy by the assured against one of the underwriters the evidence established a loss by theft and tended to implicate in the theft a servant in the exclusive employment of the plaintiff:—

Held, that it was incumbent on the plaintiff to prove a theft by some person other than a servant in his exclusive employment and that, as he had failed to do this, he could not recover.

Held, also, that, assuming the burden of proving a theft by the plaintiff's servant to lie on the defendant, he might establish such a theft by evidence which possibly might not be admitted or sufficient to convict in a criminal prosecution; and that evidence that two days before the theft the servant was seen in conference with three notorious thieves was admissible to prove his complicity; but that evidence of his bad character was not admissible.

TRIAL of action before Lush J. without a jury.

By a policy of insurance dated May 4, 1915, the defendant and others insured the plaintiff, a jeweller, from May 1, 1915, to April 30, 1916, to an amount of 2130*l.* against loss of or damage to jewellery and other property "arising from any cause whatsoever whether arising on land or water save and except breakage of furniture, china, earthenware, glass, and brittle articles, and save and except loss by theft or dishonesty committed by any servant or traveller or messenger in the exclusive employment of the assured."

On May 3, 1915, a robbery was committed at the plaintiff's premises and jewellery to the value of 725*l.* 18*s.* 1*d.* was stolen and damaged. The defendant's proportion of this loss amounted to 51*l.* 2*s.* 5*d.*, for which sum this action was brought.

The defendant pleaded that the loss was caused by the theft or dishonesty of one Mason, a servant in the exclusive employment of the plaintiff.

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The following facts were proved :—The plaintiff employed two servants, namely, Brown, the manager, and Mason, who acted under him. In the plaintiff's shop was a safe containing four trays for holding jewellery. There were duplicate keys to the door of the shop and also to the safe. The plaintiff and Brown kept each one key of the shop and one key of the safe. Evidence was tendered and admitted to show that on Saturday, May 1, two days before the robbery, Mason was seen in a public-house in close conversation with three highly-skilled safe-breakers who were well known to the police. On the same night Mason told Brown that he knew of a possible purchaser of some jewellery and arranged that they should go to the plaintiff's shop on Sunday, May 2, at 11 A.M. and remove the jewellery in order that Mason might show it to this person. Mason called for Brown on Sunday at 9 A.M. Brown was in bed. Mason asked for and obtained the keys of the shop and safe. These he took away and, returning later, restored to Brown.

On Monday, May 3, Brown and Mason remained longer than usual at the plaintiff's premises in order to repair some defect in connection with the electric light. Brown was anxious to remain until the work was finished, but at about 8.30 P.M. Mason became very insistent that they should leave and finish the work next morning. They left shortly afterwards. At about 8.45 a violent explosion occurred at the premises. Firemen arrived and found the shop locked up. They kicked open the door and went in. They found that the safe had been blown open. One of the neighbours gave evidence that no one came out of or went into the premises before the arrival of the firemen. The police arrived soon afterwards and found that of the four trays which had previously been in the safe one was still in it; two were on the floor, and one was on a table in a recess. Soap had been applied to the key-hole of the safe and was found scattered about the room and upon the trays on the floor, but not on the tray in the safe. The jewellery which had been in the safe was all gone. The learned judge drew the inference that the trays had been withdrawn from the safe before the explosion. The examination by the police showed that there had been no breaking into or out of the premises. Neither Mason nor the proposed purchaser of the jewellery was called as a witness for the plaintiff.

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Heber Hart, K.C., and *G. S. Sanders*, for the plaintiff. The evidence establishes a loss by theft. That is a loss within the policy. The plaintiff therefore shows a prima facie case. If the defendant relies upon a theft by the plaintiff's servant, the burden of proving it lies upon him: *Gorman* v. *Hand in Hand Insurance Co.* (1); *Wheeler* v. *Bavidge* (2); *The Glendarroch* (3); Bullen and Leake on Pleading, 3rd ed., p. 140. An alleged crime must be proved by evidence which would support an indictment: *Thurtell* v. *Beaumont* (4); Stephen, Digest of the Law of Evidence, art. 94, 6th ed., pp. 108, 109; Taylor on Evidence, 10th ed., p. 113. The defendant has failed to discharge the burden of proof.

Patrick Hastings, for the defendant. The plaintiff must prove a loss within the policy. Theft by a stranger is within this policy; theft by a servant is not. Where the evidence is quite as consistent with one view as with the other the party on whom the onus lies fails to make out his case: *Midland Ry. Co.* v. *Bromley*, per Crowder J. (5) The evidence in the present case is more consistent with the latter than with the former alternative. According to the older and more logical rules of pleading exceptions in a policy of insurance had to be stated by the plaintiff in his declaration—*Bamberger* v. *Commercial Credit Mutual Assurance Society* (6)—and negatived by his evidence. The warranty free from capture in a marine policy is an example: *Powell* v. *Hyde* (7); *Kleinwort* v. *Shepard* (8); *Ionides* v. *Universal Marine Insurance Co.* (9) If the burden of proving a theft by the plaintiff's servant lies upon the defendant, he has discharged it.

Heber Hart, K.C., in reply. Where the exception is part of the definition of the subject-matter of the insurance, the plaintiff, in order to prove a loss within the policy, may have to prove that it is not within the exception; but where the exception relates merely to the cause of the loss, there it is for the defendant to show that he is within the exception, both as a matter of reason and convenience. If it were otherwise a heavy burden of negative proof would be imposed upon the plaintiff.

(1) (1877) I. R. 11 C. L. 224.
(2) (1854) 9 Ex. 668.
(3) [1894] P. 226.
(4) (1823) 1 Bing. 339.
(5) (1856) 17 C. B. 372, 382.
(6) (1855) 15 C. B. 676.
(7) (1855) 5 E. & B 607.
(8) (1859) 1 E. & E. 447.
(9) (1863) 14 C. B. (N.S.) 259.

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LUSH J. In this case I have to see what light is thrown upon the occurrence by what is known of Brown and Mason. There is no suggestion that Brown took any part in the theft. As to Mason, the defendant tendered evidence of his character which I rejected as inadmissible. The defendant also tendered evidence to prove that at or near the date of the theft Mason was associating with notorious and highly-skilled safe-breakers. Mr. Hart objected to the admission of this evidence. I doubt whether the evidence would have been admissible in a criminal prosecution, not because it was irrelevant, but because in a criminal case evidence is frequently rejected which tends to prejudice the defendant and prevent a fair trial. I admitted the evidence because, although taken by itself its weight is slight, I cannot say that it is irrelevant in this case, where the whole question is whether Mason was acting dishonestly and in complicity with the actual thieves. The evidence was that two days before the occurrence a detective saw Mason in a public-house in an earnest conversation with three noted safe-breakers.

Mr. Hart has contended that the onus is on the defendant to prove that Mason was dishonest and that he was either the actual perpetrator of the theft or an accomplice of the thieves; and he asks me to hold upon the evidence that, although the circumstances may be very suspicious, there is not sufficient evidence to warrant a conclusion of fact that the loss was due to Mason's dishonesty.

Mr. Hastings says that the onus is on the plaintiff to negative the dishonesty of his servant. If so, I have no hesitation in saying that the plaintiff has not discharged the onus.

The question therefore which I have to decide is this: Is the onus on the plaintiff or the defendant? Mr. Hart cited two authorities which he said supported his contention that the onus was on the defendant. The first case was *Thurtell* v. *Beaumont*. (1) That was an action against an insurance company where the burden of proof undoubtedly lay on the defendants. But I would point out that the terms of the policy in that case were not similar to those of this policy. It was an ordinary fire policy, and the defence pleaded was that the plaintiff had himself set fire to his premises and was

(1) 1 Bing. 339.

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fraudulently claiming against the insurance company to recover a loss which had been caused by his felonious act. I can quite understand that in a case of that sort the onus would be on the defendant; but the decision is no guide in the present case.

The other case relied on by Mr. Hart was *Gorman* v. *Hand in Hand Insurance Co.* (1) That was also an action on a fire policy, the terms of which are set out at p. 230 of the report, and it was held that the burden of proof lay on the defendants. Palles C.B. said: "When, therefore, it is once shown that the loss resulted from fire, the plaintiff has established a prima facie case, and the onus is thrown upon the defendants to prove that the act which caused the fire was within the proviso. The defence is not in any sense a traverse of an allegation comprised within the general averments of the plaint; it is a plea in confession and avoidance, and the proof of it is upon the defendants." Again in my opinion that case is not really in point. The policy was not like this one. It was an ordinary insurance against fire, subject, no doubt, to the conditions in the policy. The defendants did not traverse the allegations of the plaintiff, but pleaded in confession and avoidance, and had therefore undertaken the burden of proving the facts necessary to support their plea. I think that the general law applicable to the present case can be best ascertained by considering what the plaintiff has to prove, and in Bullen and Leake on Pleading, 3rd ed., p. 182, the requisites of a declaration on a marine policy are stated thus: "Care must be taken to state the contract accurately, with all the exceptions and qualifications of the defendant's liability (*Dawson* v. *Wrench* (2)), and the declaration must negative that the defendant comes within the exceptions." The learned authors then say "but see" and cite two cases, which were not actions on policies of insurance but on charterparties, and I cannot treat those cases as authorities binding on me in this case, even if they do negative the effect of the passage immediately preceding.

The Glendarroch (3) has also been cited, but I cannot find anything in Lord Esher's judgment which militates against the accuracy of the statement in Bullen and Leake. No case has been produced which precludes me from expressing my own view on this question,

(1) I. R. 11 C. L. 224, 230. (2) (1849) 3 Ex. 359.
(3) [1894] P. 226.

having regard to the terms of this policy. Looking at the policy, it is impossible to hold that the onus is on the defendant. To do so would produce absurd results. This is not a case of an insurance against loss caused by some specified reason, such as fire or theft. It is an insurance against loss due to any cause except the two specified, namely, breakage and dishonesty of servants. If the contention of the plaintiff is right, he need only aver a loss of jewellery, and it would be for the defendant to prove that, amongst the multitude of causes which might have occasioned the loss, the actual cause was either breakage or dishonesty of servants. In my opinion the plaintiff must allege facts to show that the lost goods were covered by the policy, that the loss was one against which the defendant had agreed to indemnify the plaintiff.

I therefore hold that on this policy it was for the plaintiff to prove that the loss was one against which the defendant had agreed to indemnify him. The plaintiff has not proved that. He has proved a loss, but has left, to say the least, the gravest suspicion whether his own servant was not the cause of the loss.

I have been asked to deal with the case also on the footing that the onus is on the defendant, so that in the event of the Court of Appeal taking a different view it will not be necessary to have a new trial.

Mr. Hart has contended that I cannot decide this case in favour of the defendant unless I am prepared to hold that upon the evidence a jury ought in a criminal case to convict Mason. I do not agree. I do not think that the evidence in a civil case must necessarily be the same as in a criminal case arising out of the same matter; nor, where a case raises a question of the criminality of some third person, is a civil Court bound to find that person guilty of a criminal act upon such evidence only as would be sufficient to procure his conviction in a criminal Court. It is impossible to say that the evidence must be the same in both cases. As I pointed out during the argument, evidence of good character, though not relevant in either civil or criminal cases, is always admitted in a criminal case. In a prosecution the Court is not adjusting rights between two persons, and the judge often tells the jury that, though there is some evidence against the prisoner, it would not be safe to convict; but that cannot be done in a civil case. The distinction is founded on the principle

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that the mere fact that evidence is relevant is not sufficient to allow it to be admitted in a criminal case, because a prisoner may be so prejudiced by its admission that a fair trial would become impossible. For instance, a confession to a police officer is always excluded if the confession was induced by a promise or threat, but in a civil case, if a witness had made a statement to the police implicating himself, it would be impossible to exclude it, though the witness would of course be permitted to explain the circumstances in which it was made, and the jury would weigh that explanation. So also in the case of perjury, corroboration is necessary to obtain a conviction in a criminal case, but it would not be necessary in a civil action.

Therefore it is not correct to say that if I find that this loss was due to Mason's dishonesty it must necessarily follow that Mason should be convicted on indictment. For one thing, the evidence as to his associating with safe-breakers would probably be excluded in a prosecution. I have only to say whether the evidence is more consistent with the plaintiff's or with the defendant's case; and if I come to the conclusion that dishonesty on the part of Mason has been proved I ought not to hesitate to say so. [The learned judge reviewed the evidence again.] I cannot avoid coming to the conclusion that Mason, who was not called as a witness, was implicated in the robbery, and therefore, on the hypothesis that the onus is on the defendant, I hold that he has discharged the onus, and there must be judgment for the defendant.

Judgment for defendant.

Solicitors for plaintiff: *Hutchison & Cuff.*
Solicitors for defendant: *Windybank, Samuell & Lawrence.*

F. O. R.
W. H. G.

[COURT OF CRIMINAL APPEAL.]

1916
Dec. 18.

THE KING *v.* NAGUIB.

Criminal Law—Bigamy—Foreign Marriage—Expert Evidence.

The prisoner was indicted for marrying a woman in England while his wife, whom he had married in England, was alive. At the trial the prisoner, an Egyptian by birth and a Mahomedan by religion, who was not specially conversant with the laws of Egypt, stated in the course of his evidence that before the first marriage in England he had been duly married in Egypt according to the rites and ceremonies of that country to an Egyptian woman whom he had divorced after the first and before the second marriage in England :—

Held, that the evidence of some person conversant with the marriage laws of Egypt was necessary in order to prove the alleged marriage in Egypt, and that the prisoner could not establish that marriage by tendering his own evidence of the performance of a ceremony and leaving the Court to presume the effect thereof.

Whether the union of a man and a woman according to the law of a State which recognizes polygamy will be regarded in England as a marriage, *quaere*.

APPEAL against conviction.

The appellant was convicted at the autumn assizes a[illegible] of bigamy in marrying Teresa Josephine Sullive[illegible]ilford on January 31, 1914, his wife being then alive. It was proved that on January 10, 1903, he went through the form of marriage in England with one Annie Wheeler. He was an Egyptian by birth and a Mahomedan by religion. He stated that he came to this country in 1901, having previously in the year 1898 been married in Egypt in presence of a Mahomedan priest (1), two or three witnesses, his father, and the father of the woman. This ceremony, he said, was a valid marriage according to the laws of Egypt. He contended that, as he was validly married according to Egyptian law to a woman who was still living, his marriage with Annie Wheeler was void. He alleged that he had divorced his Egyptian wife in 1913, and concluded that he was free to marry Teresa Josephine Sullivan.

The indictment was tried before Avory J.

(1) *Sic.*

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At the close of the prisoner's case the learned judge said: "In my opinion there is in the first place no valid evidence of the marriage in Egypt which is relied on. It is not sufficient for a man to go into the witness-box and say that he was married in a foreign country under a foreign law, and that that was a valid marriage. In order to make the defence good there ought to have been some evidence by an expert, or some evidence at all events of the foreign law applicable to the subject, so as to satisfy the Court that the marriage was valid according to the foreign law. That ground alone would be sufficient to dispose of this case. But I am of opinion, further, that even if that marriage had been proved the law with regard to the matter is correctly stated thus: 'Where the lex loci contractus allows polygamy, marriage under it, even in the case of a first wife, is a different thing from monogamous marriage, and will not be regarded in England as a marriage, nor will the matrimonial duties arising under it be enforced, or any divorce or other relief granted for a breach of them.' (1) I believe that to be a correct statement of the law, and, therefore, even if it had been properly proved that this marriage was solemnized in a country where polygamy is lawful according to the law of that country, I should still have held that it was not a valid marriage in England which could be recognized for the purpose of this indictment, and, as the prisoner's only defence to this charge is that he was already married in Egypt when he married Annie Wheeler, Mr. Nelson will consider whether he wishes to address the jury."

The prisoner then pleaded guilty and was sentenced to imprisonment with hard labour for eight months.

The prisoner appealed.

E. T. Nelson, for the appellant. The appellant gave evidence of a marriage in Egypt. In the absence of evidence to the contrary it will be presumed that all the formalities necessary to a valid marriage were duly complied with. If there was a valid marriage in Egypt the marriage with Annie Wheeler was void and the offence charged was not committed.

(1) Westlake, Private International Law, ch. 4, s. 34; 5th ed., p. 73, citing *In re Bethell* (1888) 38 Ch. D. 220. See also Dicey, Conflict of Laws, 2nd ed., p. 260.

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Travers Humphreys, for the Crown. The appellant, relying upon a marriage in Egypt, must prove a marriage valid according to the laws of Egypt. To do this he must adduce evidence of some one conversant with those laws: *Reg.* v. *Povey* (1); *Reg.* v. *Savage* (2), where Lush J. refused to follow *Reg.* v. *Newton*. (3) A marriage celebrated abroad between two British subjects according to a ritual valid in England might be held good in England without evidence of the law of the foreign country: *Reg.* v. *Griffin*. (4) But in all other cases evidence not only of the fact but also of the validity of the ceremony is necessary.

The judgment of the COURT (Viscount Reading C.J., Bray and Atkin JJ.) was delivered by

VISCOUNT READING C.J. In 1903 the appellant went through the form of marriage with Annie Wheeler at Salford according to English law. He insists that this marriage was void because he had in 1898 married an Egyptian woman who was still his wife in 1903. The learned judge at the trial disposed of this defence on two grounds—first, that the Egyptian marriage was according to the Mahomedan religious law which permits polygamy and could not be regarded in England as a marriage. That raises an interesting question, but we need not deal with it, because we are satisfied that this appeal fails on the second ground, namely, that there was no sufficient evidence of the marriage in Egypt. The appellant no doubt gave a description of a ceremony, but he was not qualified to give evidence of the essential requisites of a valid marriage in Egypt. Therefore the case stands thus, that, having a wife, Annie Wheeler, the appellant had gone through the form of marriage with another woman, Teresa Josephine Sullivan. There is no doubt that, where the prosecution relies upon a foreign marriage, it is incumbent upon the Crown to prove the essential requisites of a valid marriage according to the law of the foreign country, and that the foreign law can only be proved by some one conversant therewith. As was said in *Reg.* v. *Povey* (5), "There may be certain cases, perhaps, in which it may not be necessary to have a lawyer to give evidence;

(1) (1852) Dears. C. C. 32.
(2) (1876) 13 Cox, C. C. 178.
(3) (1843) 2 Moo. & R. 503.
(4) (1879) 14 Cox, C. C. 308.
(5) Dears. C. C. 32, 36.

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but the Court is clearly of opinion that some witness conversant with the Scottish law of marriage should have been called on the part of the Crown." Later in *Reg.* v. *Savage* (1) Lush J., refusing to follow *Reg.* v. *Newton* (2), held that there must be strict evidence of the law of Scotland where the marriage was said to have been celebrated, and as there was no such evidence the prisoner was acquitted. Again in *Rex* v. *Lindsay* (3) Walton J. followed *Reg.* v. *Savage* (1), as have all the later cases in accordance with the *Sussex Peerage Case.* (4) Therefore we are clearly of opinion that a claimant relying on a foreign marriage, or the Crown in a prosecution for bigamy alleging an earlier marriage in a foreign country, must adduce expert evidence to prove the validity of the marriage according to the law of the foreign country. We see no difference in the law applicable to defendants. In the judgment of the Exchequer Chamber delivered by Willes J. in *Lloyd* v. *Guibert* (5) the following passage occurs: "A party, who relies upon a right or an exemption by foreign law, is bound to bring such law properly before the Court, and to establish it in proof. Otherwise the Court, not being entitled to notice such law without judicial proof, must proceed according to the law of England." In the present case, as there is no proper evidence of the essential requisites of a marriage in Egypt, and nothing to show that the alleged marriage was a valid marriage according to the law of that country, the appeal fails.

Appeal dismissed.

Solicitor for appellant: *Registrar of the Court of Criminal Appeal.*
Solicitor for the Crown: *Director of Public Prosecutions.*

(1) 13 Cox, C. C. 178.
(2) 2 Moo. & R. 503.
(3) (1902) 66 J. P. 505.
(4) (1844) 11 Cl. & F. 85.
(5) (1865) L. R. 1 Q. B. 115, 129.

W. H. G.

MACMILLAN AND ANOTHER *v.* LONDON JOINT STOCK BANK, LIMITED.

1916
Dec. 11, 12, 20.

[1916 M. 1149.]

Banker—Cheque—Alteration of Amount—Liability of Bank—Mandate of Customer—Negligence.

The plaintiffs, a business firm, had in their service a confidential clerk whose integrity they had no reason to suspect. It was the clerk's duty to fill in cheques for signature. The clerk presented to one of the partners in the plaintiffs' firm for signature a cheque drawn in favour of the firm. There was no sum in words written on the cheque in the space provided for writing, and there were the figures " 2.0.0 " in the space intended for figures. The partner signed the cheque. The clerk subsequently added the words " one hundred and twenty pounds " in the space left for words and wrote the figures " 1 " and " 0" on either side of the figure " 2." The clerk presented the cheque for payment at the defendant bank, with which the plaintiffs kept an account, and obtained payment of, and misappropriated, 120*l.* out of the plaintiffs' account :—

Held, that the signing of the cheque in the above circumstances did not constitute negligence such as to prevent the plaintiffs from recovering from the bank the amount paid, less the 2*l.*

ACTION in the commercial list tried by Sankey J. without a jury.

The plaintiffs claimed to recover a sum of 235*l.* which they alleged had been paid by the defendant bank out of their account on forged cheques. The facts of the case are set out in the judgment.

Holman Gregory, K.C., and *Jowitt*, for the plaintiffs.

Roche, K.C., and *A. Neilson*, for the defendants.

[The arguments were directed to the inferences of fact which ought to be drawn from the evidence and to the principles of law laid down in the authorities referred to in the judgment. In addition to the cases there mentioned *Lloyd's Bank* v. *Cooke* (1) and *Herdman* v. *Wheeler* (2) were referred to.]

Cur. adv. vult.

1916. Dec. 20. SANKEY J. read the following judgment :—In this case the plaintiffs bring an action against their bankers, the

(1) [1907] 1 K. B. 794. (2) [1902] 1 K. B. 361.

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Sankey J.

London Joint Stock Bank, Limited, in respect of sums which they allege the bank has paid away upon forged cheques.

The facts are as follows: The plaintiffs had in their employment a confidential clerk of the name of Klautschi. He had been with them for some years and they had no reason to distrust him. They left to him the keeping of their books and the filling in of cheques for signature. On the morning of February 9, 1915, one of the plaintiff partners, Mr. Arthur, was going out to lunch about midday. He had his hat on and was leaving the office when the clerk came up to him and said he wanted 2*l.* for petty cash and produced a cheque for signature. The clerk had repeatedly presented cheques for signature to get petty cash, but usually for 3*l.*, and Mr. Arthur asked him why it was not 3*l.* on this occasion. The clerk replied that 2*l.* would be sufficient. Mr. Arthur thereupon signed the cheque, which I shall discuss more in detail later on. On the next day the clerk did not come to business. Mr. Arthur took the opportunity to look through the clerk's books and found matters which so excited his suspicion that he consulted his solicitor, and on February 11 both he and the solicitor went to the bank. They there found that the clerk had presented a cheque for 120*l.*, which had been paid to him. The clerk was a thief and absconded with the money. His books were subsequently examined, and in the result a number of discrepancies were found.

Upon June 30 the plaintiffs issued a writ against the defendants claiming 235*l.* which they alleged had been paid by the bank out of the plaintiffs' account on forged cheques. This sum divides itself into two parts. There are a number of cheques beginning July 19, 1913, and ending February 24, 1914, amounting to 117*l.*, which stand in one position, and there is the cheque for 120*l.*, which stands in an entirely different position.

As to the first of these items the plaintiffs have failed to satisfy me either that the cheques were forged or that the bank has paid the amounts away improperly. The plaintiffs remember nothing about the cheques and cannot say for what amount they signed them, as both counterfoils and cheques have disappeared. It may be that they signed them for the amount which the bank paid and that the clerk afterwards embezzled the money. This part of the action fails.

I now turn to the second part, and it becomes necessary to examine the cheque for 120*l.* minutely. Mr. Arthur says that when he signed the cheque there was written in the space where writing is provided for the words "two pounds" and in the space where figures are provided for "2.0.0." Afterwards, it is suggested, the clerk added the words "one hundred and" before the word "two" and converted the word "two" into the word "twenty," that he then placed the figure "1" before and the figure "0" after the figure "2," and in the result the cheque appeared to be a cheque filled up with the words "one hundred and twenty pounds" and in figures "£120.0.0." After listening to the plaintiffs' evidence and considering the cheque itself and the evidence given thereon by the defendants' expert witness, I am satisfied that this suggestion is wrong. I recollect that Mr. Arthur was in a great hurry when he signed the cheque, and I find the fact to be that when he signed it there were no words at all in the space left for words; that space was a blank. There were the figures "2.0.0" in the space left for figures. The clerk, having obtained Mr. Arthur's signature to the cheque in this condition properly dated and payable to "ourselves," added the words "one hundred and twenty pounds" in the space left for words and the figures "1" and "0" on either side of the figure "2."

It remains to consider the legal effect arising upon this position, which is not that of a cheque entirely forged, but of a cheque which after signature has been altered and raised to a greater amount than that for which it was intended to be drawn; but before doing so I must make some other findings, which are as follows: The plaintiffs had entire confidence in Klautschi and had no reason whatever to suspect his integrity before the forgeries were found out. They were entitled to consider him an honest man and to rely upon his honesty. They did not examine either their cheque-books or pass-books regularly, although a minute examination of them would have led to a suspicion, if not to the discovery, of Klautschi's dishonesty. Apart from authority, the plaintiffs in my view were not guilty of any negligence up to the time of signing the cheque in question, nor do I think that, having regard to the trust which they rightly reposed in Klautschi, Mr. Arthur was guilty of negligence in signing the cheque as and when he did.

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Unless, therefore, the state of the authorities is such that I am compelled to hold that the defendants are under the circumstances entitled to my judgment, my decision will be in favour of the plaintiffs.

The law appears to me to stand as follows. In cases where a banking company has paid away a customer's money on a forged cheque two points have to be considered: (1.) What was the mandate given by the customer to the banker? (2.) Was there negligence in and about giving the mandate? As to (1.), what was the mandate given by the plaintiffs to the defendants? If no other fact appears except that the cheque was a forgery from beginning to end, it is clear that the customer has given no mandate and the bank has no right to pay on the cheque. As an abstract proposition it may be stated that the risk of forgery is a banker's risk, not a customer's risk. On the other hand, if a customer signs a blank cheque he authorizes the person in whose hands it is to fill it up as his agent: *Scholfield* v. *Earl of Londesborough* (1), and per Lord Watson in the House of Lords; see Bills of Exchange Act, 1882, s. 20. Whether the reason for this is that it is part of the law merchant or whether it proceeds upon the ground of estoppel is immaterial, because in the present case the plaintiffs did not sign a blank cheque, but a cheque for 2*l.* in figures though not in words, and it is not in my opinion possible to say that he authorized the clerk to fill in the words "one hundred and twenty pounds" or to place the "1" and "0" before and after the figure "2" respectively. I find, therefore, that the plaintiffs did not either expressly or impliedly by reason of signing a blank cheque give a mandate to the defendants to pay this 120*l.* The only mandate they gave was a mandate to pay 2*l.*

As to (2.), were the plaintiffs guilty of negligence in and about giving the mandate? I propose to state a series of propositions which appear to me to be the result of the cases. (1.) The relationship of banker and customer creates a duty owing by the customer to the banker: *Colonial Bank of Australasia* v. *Marshall* (2), a Privy Council case which, though not binding on me, has the authority of Lord Halsbury and Lord Macnaghten. It is difficult, if not impossible, to attempt any definition of such duty, because

(1) [1895] 1 Q. B. 536; [1896] A. C. 514, 536. (2) [1906] A. C. 559.

its extent may depend upon an agreed or established course of dealings between the parties. Kennedy J. gave his views of such duty in *Lewes Sanitary Steam Laundry Co.* v. *Barclay & Co.* (1) Bray J. gave his views in *Kepitigalla Rubber Estates* v. *National Bank of India.* (2) Apart from contract or course of dealing between the parties, in my view the duty is that the customer must take reasonable care not to mislead the bank. (2.) For negligence in discharge of that duty the customer may be held responsible. (3.) But the negligence must be negligence in, or reasonably connected with, the transaction itself: *Bank of Ireland* v. *Trustees of Evans' Charities* (3), per Parke B. It must be the proximate or effective cause of the fraud: *Baxendale* v. *Bennett* (4), per Bramwell L.J. The loss occasioned must be the natural result of the neglect of duty: *Union Credit Bank* v. *Mersey Docks and Harbour Board* (5), per Bigham J. (4.) A number of cases are to be found in the books which lay down negatively acts which in themselves are not necessarily negligent. Carelessness in keeping a cheque-book is not necessarily negligence: *Bank of Ireland* v. *Trustees of Evans' Charities.* (6) It is not necessarily negligent to draw a cheque with spaces which can be utilized for the purposes of fraudulent alteration: *Colonial Bank of Australasia* v. *Marshall.* (7) It is not necessarily negligence for a customer to fail to examine his pass-book: *Kepitigalla Rubber Estates* v. *National Bank of India.* (2) The case of *Lewes Sanitary Steam Laundry Co.* v. *Barclay & Co.* (1) perhaps went further than any other, because there the defaulting clerk had, to the knowledge of the chairman of the company, committed forgery on a previous occasion. (5.) I do not think it is desirable for a judge to decide, as against his successors, by anticipation what is negligence. In each case it is a question of fact to be arrived at by a consideration of the surrounding circumstances. I may, however, be permitted to refer to Lord Halsbury's opinion in *Bank of England* v. *Vagliano* (8), where he suggests that the conduct of the plaintiff was negligent in connection with the act or transaction—that is to say that in addition to the forged bills in that case the Bank was misled by

(1) (1906) 11 Com. Cas. 255.
(2) [1909] 2 K. B. 1010.
(3) (1855) 5 H. L. C. 389, 410.
(4) (1878) 3 Q. B. D. 525.
(5) [1899] 2 Q. B. 205, 213.
(6) 5 H. L. C. 389.
(7) [1906] A. C. 559.
(8) [1891] A. C. 107, 114.

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the signing of advice notes by, or with the genuine authority of, Vagliano himself.

One case only remains to me to deal with—*Young* v. *Grote*. (1) It was greatly relied upon by the learned counsel for the defendants. The case has had a remarkable history. Best C.J. states that he decided it upon the ground that the bank had been misled by want of proper caution on the part of their customer, and some learned judges have accepted the fact that it was so decided. Others have stated that it can only be supported upon the ground that the customer signed a blank cheque, which consequently gave authority to any person in whose hand it was to fill up the cheque in whatever way the blank permitted. Some judges again have said that *Young* v. *Grote* (1) "must be considered as well decided": *Bank of England* v. *Vagliano* (2), per Lord Field. Others have described it as "the fount of bad argument": *Scholfield* v. *Earl of Londesborough* (3), per Lord Esher M.R.; and the modern tendency has been to bury rather than to praise it. It must be remembered the facts were very peculiar. It was decided upon a case stated by an arbitrator who expressly found negligence. The customer himself had given a blank cheque to his wife to fill up. The wife caused it to be filled up with a sum of 50*l.* 2*s.* 3*d.*, and a clerk afterwards altered it so as to make it 350*l.* 2*s.* 3*d.* It was held that the loss must fall on the customer. Lord Esher M.R. said (3) the case might be supported upon the ground that the giving by the customer of a signed blank cheque authorizes the person into whose hands it comes to fill it up. If this is so it has no relation to the present case, as the cheque here was not a blank one. If, on the other hand, the case is to be supported upon the ground of negligence, it only deals with a particular finding upon a particular fact in a particular case. I should venture to doubt whether such a finding would be come to again: *Scholfield* v. *Earl of Londesborough* (4), per Lord Halsbury. A collection of and a discussion upon the cases bearing on *Young* v. *Grote* (1) will be found in the late Mr. Beven's book on Negligence, vol. 2, 3rd ed., pp. 1317—1331, and in Sir John Paget's Law of Banking, 2nd ed., p. 189. In my view *Young* v. *Grote* (1) is not a case which can usefully be cited as an authority.

(1) (1827) 4 Bing. 253.
(2) [1891] A. C. 170.
(3) [1895] 1 Q. B. 543.
(4) [1896] A. C. 524.

Remembering the above-mentioned propositions, I now turn to consider their bearing in the present case. I have come to the conclusion (*a*) that the plaintiffs were not guilty of any negligence which misled the bank, and (*b*) that if they were guilty of any negligence it was not negligence which caused the loss. The failure to examine their cheque-books or their pass-books and the signing the cheque as and when Mr. Arthur did do not in my opinion constitute negligence such as to prevent the plaintiffs recovering in the present action. They were entitled to trust their clerk, and there was no duty owing by them to the bank to anticipate the clerk's crime. Business can only be conducted by trusting, not suspecting, those with whom and by whom it is carried on. Beyond that I can see no negligence which was proximate to and occasioned the loss. At the most all the plaintiffs did was to give to a clerk whom they rightly trusted an opportunity of misleading the bank. When the only negligence suggested against the customer is the fact that he has given an opportunity for a clerk to commit forgery, such negligence is not sufficient to make the customer liable, for the forgery, not the opportunity, is the proximate cause of the loss. It is doubtful, on the cases, whether a customer is ever liable in a case of a raised cheque unless, as suggested in *Vagliano's Case* (1), he has by some contemporaneous or subsequent act or document misled the bank into paying on it.

For these reasons I am of opinion that the plaintiffs are entitled to succeed to the extent of 118*l.*, which is all they claim, being the sum in excess of the amount for which Mr. Arthur signed the cheque. Therefore there will be judgment for the plaintiffs for 118*l.* with costs.

Judgment for plaintiffs.

Solicitor for plaintiffs: *Edward H. Coopman.*
Solicitors for defendants: *Morley, Shirreff & Co.*

(1) [1891] A. C. 107.

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[IN THE COURT OF APPEAL.]

MODERN TRANSPORT COMPANY, LIMITED *v.* DUNERIC STEAMSHIP COMPANY.

[1915 M. 2740.]

Ship—Time Charter—Restraint of Princes—Requisition by Admiralty—Claim for Hire.

A time charter provided that the owners should let and the charterers should hire a steamship for twelve months at a certain sum payable monthly for hire. The charter contained certain restrictions on the user of the ship and certain exceptions, by one of which restraint of princes was mutually excepted. The charterers were to have the option of sub-letting the ship. After the ship had been placed at the charterers' disposal the Admiralty by notices addressed first to the owners and then to the charterers requisitioned the ship for the service of the Government, and sent the owners a form of charterparty free from the restrictions of the time charter and specifying a monthly sum for hire less than that named in the time charter. The ship was then placed at the disposal of the Admiralty and was restored to the owners during the currency of the time charter :—

Held, that the owners were entitled to hire under the time charter notwithstanding the requisition of the ship by the Admiralty.

Tamplin Steamship Co. v. *Anglo-Mexican Petroleum Products Co.* [1916] 2 A. C. 397 followed.

Decision of Sankey J. [1916] 1 K. B. 726 affirmed.

Cross-appeals from the decision of Sankey J. (1)

The plaintiffs were the time charterers and the defendants were the owners of the steamship *Duneric*. The defendants having asserted the right in the circumstances stated below to withdraw the vessel from the service of the plaintiffs, the latter claimed an injunction to restrain the defendants from so doing. The defendants contended that they were entitled to withdraw the vessel because of the plaintiffs' failure to pay the hire punctually, and they counter-claimed for a sum alleged to be due for hire. The plaintiffs replied that the hire claimed was for a period during which the *Duneric* was requisitioned and used by His Majesty's Government and that no hire was due.

(1) [1916] 1 K. B. 726.

The facts were as follows:—By a time charterparty dated March 2, 1915, made between the defendants as owners and the plaintiffs as charterers, it was agreed that the defendants should let and plaintiffs should hire the *Duneric* for a period of twelve calendar months from the date of being placed at the charterers' disposal, at a rate of 2350*l.* per calendar month, payable monthly in advance.

The several clauses of the charterparty material to the present case were as follows:—(1.) There was a clause limiting the cargo which the vessel was entitled to carry; she was forbidden to carry contraband of war. (2.) There was a clause limiting the voyages she might perform; she was only to be employed between safe ports of the United Kingdom and the Continent of Europe not east of Dieppe nor east of Sicily. (3.) There was a cesser clause prescribing the events upon which the hire should cease or be suspended. (4.) There was an exception clause under which the restraint of princes was mutually excepted. (5.) There was a clause giving the plaintiffs an option of sub-letting the steamer.

The vessel was duly placed at the plaintiffs' disposal upon April 15, 1915. Upon May 21 the Admiralty, by a requisition notice of that date delivered to the defendants' agents, Messrs. Andrew Weir & Co., gave notice requisitioning the *Duneric* from the defendants for immediate use on Government service. A few days afterwards a form of Government charter was sent to Messrs. Andrew Weir & Co., which was completed by them, under which there was no such limitation, either as regards cargo or voyage, as there was in the time charter between the plaintiffs and defendants.

Upon May 26 Messrs. Andrew Weir & Co. informed the plaintiffs by a letter of that date that the Government had requisitioned the *Duneric*, and upon June 11 the vessel was placed at the disposal of the Admiralty and was employed on Government business up till December 4, when the Government gave her up.

The sum which the Government paid for the use of the vessel was 1173*l.* 15*s.* monthly. As above pointed out, the monthly hire under the time charter between plaintiffs and defendants was 2350*l.*, a sum greatly in excess of the amount paid by the Government.

Considerable correspondence took place between the parties and their solicitors as to whether the Government had hired the vessel

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from the plaintiffs or from the defendants, and upon June 4, 1915, the Admiralty agents sent to the plaintiffs a copy of the requisition they had already sent to the defendants.

The plaintiffs argued in such correspondence that they were not liable to pay the hire during the time the vessel was used by the Government. The defendants argued the other way. Both parties being anxious to assist the authorities, the defendants agreed to collect the hire payable from time to time by the Government, and they wrote on June 10 saying "We still maintain the position we have taken up, but in order to carry out the wishes of the Admiralty and entirely without prejudice to our claim we have ordered the master to follow the instructions of the Admiralty."

Upon June 14 the defendants sent in their account for the third month's hire, which would have been due on the next day if nothing had happened in the meanwhile to alter the state of affairs.

Correspondence again ensued between the parties, the gist of which was that the plaintiffs refused to pay the hire and the defendants suggested arbitration. By the end of June the parties had consulted their solicitors, who were discussing whether going to arbitration or going straight to the Courts would be preferable, but on July 9 the defendants nominated their arbitrator, and upon July 15 the plaintiffs nominated theirs. Upon July 20, when another month's hire had, if the defendants' contention was correct, fallen due, Messrs. Andrew Weir & Co. wrote on behalf of the defendants: "We are in receipt of your letter of yesterday. The matter of the time charter hire, interest, &c., will be dealt with by the arbitrators." And upon July 22 the plaintiffs' solicitors wrote that their clients had no objection at all to the Government paying the hire to the defendants pending the arbitration.

The arbitration proceedings were protracted, and the defendants from time to time sent in their account for hire. Before the next hire accrued due, namely, November 2, the Government wrote informing the defendants that the *Duneric* would be discharged from His Majesty's service when clear of her cargo at Middlesbrough, and upon November 30 the defendants passed that information on to the plaintiffs. No award had as yet been made in the arbitration.

Upon November 16 the defendants again wrote demanding the hire, and upon November 17 the plaintiffs replied that they were

content to leave the question of the responsibility for the difference between the Admiralty rate and their own time charter rate to the decision of the arbitrators or to the Courts. Upon the next day the defendants threatened to withdraw the steamer. She was not given up by the Government till December 4, but on November 25 the plaintiffs issued a writ claiming an injunction to restrain the defendants withdrawing the *Duneric* from their service. December 4 was in fact the first day upon which the plaintiffs could have had the vessel, and upon that day they tendered a cheque for the next month's hire in advance, which was refused.

Sankey J. held that the owners were entitled to hire notwithstanding the requisition of the vessel by the Admiralty, and, further, that under the circumstances the owners were not entitled to withdraw the ship.

The plaintiffs appealed, and the defendants gave notice of cross-appeal.

Adair Roche, K.C., and *R. A. Wright* (*Le Quesne* with them), for the plaintiffs. The ship was in the Admiralty service under requisition (1) for over six months out of the chartered time. There was a restraint of princes which operated so as to prevent the defendants from giving to the plaintiffs the use of the ship upon which the right to the payment of the hire under the charterparty arose. The "use and hire" of the ship was the consideration for which the plaintiffs had to pay the defendants. The use of the ship and the payment of the hire are dependent upon one another. During the time when the ship was under requisition the defendants did not give the plaintiff the use of the ship, and the hire therefore was not payable for that time. The events enumerated in the charterparty upon the occurrence of which the hire is to cease are not exclusive. It is not suggested that there has been a frustration of the commercial adventure so as to determine the charterparty; it is only submitted that payment of the hire is suspended. [They referred to *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (2); *Brown* v. *Turner, Brightman & Co.* (3)]

(1) Proclamation of August 3, 1914; see Manual of Emergency Legislation, 1914, p. 386.

(2) [1916] 1 K. B. 485, 492; [1916] 2 A. C. 397.

(3) [1912] A. C. 12.

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MacKinnon, K.C., and *Raeburn*, for the defendants. The learned judge was right upon the main point. In order to succeed the plaintiffs must show some implied term in the charterparty under which the hire is to cease. Such a term cannot be implied from the words "the use" of the ship. Those words mean such use of the ship as the shipowners can give when not prevented by an excepted peril. If an embargo prevented the ship from sailing for a fortnight, the charterers would still have the use of the ship during the fortnight and the hire would continue to be payable. The same consideration applies in the present case. Time only comes into consideration when it is of such a length as to frustrate, and thus put an end to, the adventure. *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (1) is really indistinguishable from the present case and is an authority in favour of the defendants.

As to the cross-appeal by the defendants on the claim of the plaintiffs for an injunction to restrain them from withdrawing the ship, the owners are given the right of withdrawal by the contract. The defendants did not elect to waive the punctual payment of the hire or not to take advantage of it. It cannot be suggested that there was any supervening agreement affecting the right of the shipowners to withdraw the ship. [They referred to Anson on Contracts, 13th ed., p. 320.]

Adair Roche, K.C., in reply. As to the question of the relief given to the plaintiffs, it is eminently reasonable. As to the plaintiffs' appeal, the payment for the use of the ship goes to the whole consideration for the contract: *Poussard* v. *Spiers & Pond* (2); *Wehner* v. *Dene Steam Shipping Co.* (3) Although the withdrawal may be assented to by the charterer, yet, if the use of the ship is not in fact had, no hire is payable. The clause as to cesser of hire is clearly not exhaustive; various circumstances are left unprovided for by it. *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (1) is distinguishable on the facts. [He also referred to *Horlock* v. *Beal.* (4)]

Cur. adv. vult.

Nov. 10. SWINFEN EADY L.J. The plaintiffs appeal from the judgment of Sankey J. upon the counter-claim, which determined

(1) [1916] 2 A. C. 397.
(2) (1876) 1 Q. B. D. 410.
(3) [1905] 2 K. B. 92.
(4) [1916] 1 A. C. 486.

that the plaintiffs were liable to pay the hire of a steamship under a time charter for the period during which she was requisitioned by the Government, although the amount paid by the Government was substantially less than the chartered hire. The defendants, the shipowners, do not make any claim to any part of the hire paid by the Government; they are content that the time charterers should receive the whole of it, nevertheless paying the chartered hire. The appellants contend that, as during the period when the ship was under requisition they no longer had the use of the ship, there was an entire failure of consideration, and that they are not under any legal liability for the hire during that time. The defendants recovered judgment against the plaintiffs for 8627*l.* 0*s.* 9*d.*, and from this judgment the plaintiffs appeal.

By a time charter dated March 2, 1915, made between the defendants as owners and the plaintiffs as charterers, it was agreed that the defendants should let and the plaintiffs should hire the steamship *Duneric* for a period of twelve calendar months from date of being placed at charterers' disposal at a rate of 2350*l.* per calendar month, payable monthly in advance, and at and after the same rate for any part of a month, for the use and hire of the vessel, any hire paid in advance and not earned to be refunded; the owners to provide and pay for all provisions and wages of captain and crew and all stores and insurance on the vessel, including war risks. The owners had power to withdraw the vessel in default of punctual and regular payment of the hire. The charterparty contained restrictions as to the trades in which the vessel was to be engaged, and also as to the limits of the voyages.

The ship was placed at charterers' disposal on April 15, 1915, and the period of twelve months ran from that date. On May 21, 1915, the ship was requisitioned by the Admiralty, and on June 11, 1915, the Admiralty service began. The monthly hire paid by the Government was 1173*l.* 15*s.*, while the chartered monthly hire was 2350*l.* Under these circumstances disputes arose between the parties. The defendants contended that the charterparty was subsisting and the monthly chartered hire still payable by the plaintiffs. The plaintiffs contended that by reason of the requisition they were absolutely free of the time charter. On June 17 the defendants wrote that unless the month's hire which became due in

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advance on June 15 was paid by the plaintiffs they would be forced to ask the plaintiffs to arbitrate in the terms of the charter. The plaintiffs expressed their willingness to have the matter arbitrated upon, but pointed out that, as the arbitrators would doubtless be requested to state a case for the opinion of the Court on the legal points involved, they would prefer the matter being referred straight to the Court, and thus save unnecessary expense. The defendants, however, said that they did not see why they should be asked to give up their right to a commercial arbitration under the charter-party and insisted on arbitration. The defendants then on July 9 appointed an arbitrator, and required the plaintiffs to do the same, and to appoint a person not a lawyer within seven days. On July 15, accordingly, the plaintiffs appointed a commercial gentleman as arbitrator. Correspondence then took place with regard to discovery and inspection of documents, and on July 22 the plaintiffs at the suggestion of the arbitrators agreed that the defendants should receive the hire payable by the Admiralty, without prejudice to any question. On November 2 the Admiralty gave notice that the vessel would be discharged from Government service when cleared of her cargo at Middlesbrough. By this time the conditions of the freight market were changed, and if the vessel were surrendered by the Admiralty it would be more beneficial to the owners to be free from the residue of the charterparty. On November 16 the defendants sent a debit note for chartered hire and interest claimed to be due. This included hire in advance for the month up to December 15 and gave credit for the Admiralty hire. Whether the sum so arrived at gives credit for the whole of the hire paid by the Admiralty up to the time of actually redelivering the ship does not appear, but no question of figures has been raised before us on this appeal, and the sum appearing in this debit note is the exact sum for which the defendants obtained judgment. The defendants required payment and threatened to withdraw the vessel if not paid; the plaintiffs answered that they were content to leave the question of their liability to the decision of the arbitrators or the Court, but that, as the defendants themselves had insisted on arbitration, it was not right for them to ask the plaintiffs to abandon their legitimate rights pending the arbitration proceedings. It must be remembered that the arbitra-

tion involved the question whether the charterparty was a subsisting agreement between the parties. On November 18 the defendants nevertheless insisted on payment by the 19th, and on November 19, in default of payment, gave notice purporting to withdraw the vessel. The plaintiffs took up the position that, whether they were right or wrong in their contention that they were not liable to pay chartered hire while the vessel was under requisition, the defendants were not entitled to take the law into their own hands and withdraw the vessel while the dispute as to liability was being arbitrated upon. The plaintiffs then on November 25, 1915, issued a writ claiming an injunction, and obtained an interim injunction on December 1, so that when the vessel was actually released and redelivered by the Admiralty on December 4 they obtained the use of the vessel; on December 10 the action was tried and the injunction continued, and the plaintiffs continued to have the undisturbed use of the ship until May 6, 1916, when on the termination of the time charter and the completion of the current voyage the plaintiffs redelivered her to the defendants.

Upon the plaintiffs' appeal the only question is whether they continued liable to pay the monthly hire while the vessel was under Admiralty requisition. The plaintiffs contended that there was an entire failure of consideration, and that they could not be liable as they did not have the use for which alone they were to pay the hire. The first answer is that the defendants did not agree to give the use of the ship absolutely and unconditionally, but only unless prevented (amongst other things) by the restraint of princes. Again, there was not an entire failure of consideration if the charterparty was subsisting, as the plaintiffs would become entitled to the hire payable by the Admiralty. No question is raised in this case as to any apportionment between owners and time charterers of the Admiralty hire, as the owners agree that the charterers may have the benefit of the whole of it, and notwithstanding that the form of the Admiralty charter T.99 gives the Admiralty as charterers larger powers and rights than the charterers alone could have conferred upon any sub-charterer, having regard to the terms of their own charterparty. The question raised by the plaintiffs is, however, in my judgment, completely disposed of by the decision of the House

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of Lords in *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (1) That was the case of a time charter, where the charterer was to pay for " the use and hire " of a steamer, and the charter contained an exception of " restraint of princes," and there was power to sub-let. When requisitioned by the Government, there were three years unexpired of the charter term of five years, and when the case was decided in the House of Lords there were still about nineteen months unexpired. It was held by the House of Lords that the charterparty did not come to an end when the steamer was requisitioned, and that the requisition did not suspend it or affect the rights of owners or charterers under it. Accordingly the time charterer remained liable to pay the chartered hire and became entitled to receive the Admiralty hire, subject, however, to any question of apportionment, which I have already pointed out does not arise in the present case. In this case the Admiralty requisition proved to be for less than half the period of the time charter, and in my judgment the plaintiffs were properly held liable for the chartered hire while the ship was under requisition. No question arises about the chartered hire after the ship was restored by the Government to the time charterers, as this was duly paid by the plaintiffs monthly in advance as required by the charterparty.

There remains the question raised by the defendants by their cross-notice of appeal. The defendants ask for a declaration that they were entitled to withdraw the vessel by reason of non-payment of hire, and that the notice of withdrawal given on November 19 was valid and effectual, and that since that date the plaintiffs have had no right to any further user of the vessel under the charterparty. The defendants do not claim any consequential damages, nor do they offer to repay the chartered hire which they have been receiving from December, 1915, to May, 1916. They also ask for the dissolution of the injunction granted by the judgment, and for an inquiry as to damages in respect of the interim injunction, that is to say, in respect of the six days' user of the vessel by the plaintiffs between December 4, 1915, when she was actually restored by the Admiralty, and December 10, 1915, when the action was tried. The facts which I have already stated in detail show that there was a bona fide dispute between the parties as to whether the charter was still

(1) [1916] 2 A. C. 397.

subsisting after the requisition, and if so whether the hire continued payable by the charterers during the period of the Government requisition. The defendants insisted on their right to refer this matter to commercial arbitration. This arbitration appears to have dragged its slow length along, beginning in July and having made but little progress by November, when defendants threatened to take the law into their own hands and decide the case in their own favour by actually withdrawing the ship. The interim injunction was then granted on December 1, 1915, and the case finally heard and judgment given within fifteen days from the issue of the writ. But for the defendants insisting upon commercial arbitrators first dealing with the matter, the dispute could have been decided by the judge long previously. In my judgment the defendants were not entitled to anticipate the arbitrators' decision and withdraw the vessel by the notice of November 19 when the matter was before the arbitrators and no decision had been given.

The circumstances of this case were of a character to lead the plaintiffs to believe that any right to require payment or to withdraw the ship for non-payment would be suspended until there had been determined in the arbitration what the respective rights of the parties were, whether the time charter was still subsisting or not, and whether or not the plaintiffs remained liable to pay the hire. Pending the arbitration and immediately upon it appearing that the Admiralty were about to release the ship, when it would be to the advantage of the owners to have their ship free from the charter, it was not open to them to ignore the arbitration proceedings and serve notice of withdrawal.

It was said by Lord Cairns in *Hughes* v. *Metropolitan Ry. Co.* (1): "It is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable

(1) (1877) 2 App. Cas. 439, 448.

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having regard to the dealings which have thus taken place between the parties." These observations are directly applicable to the present case, and it would be inequitable, having regard to the correspondence and the arbitration proceedings, to allow the defendants by their notice of November 19 to enforce any right to withdraw the ship for non-payment of hire. And this is the only notice of withdrawal on which the defendants rely. It is also to be observed that the defendants have recovered judgment on their counter-claim for hire in respect of a period subsequent to the alleged forfeiture. I am of the opinion that under the circumstances the interim injunction was properly granted and was properly continued at the hearing. Even if the plaintiffs at the hearing had not been able to maintain their claim to a continuance of the injunction, the question would still remain whether the defendants ought to be awarded any damages upon the undertaking. The undertaking in its expanded form is as follows: "The plaintiffs undertaking to abide by any order this Court may make as to damages in case this Court should hereafter be of opinion that the defendants shall have sustained any by reason of this order which the plaintiffs ought to pay."

Having regard to the circumstances under which the notice to withdraw of November 19 was given, I am of the opinion that the plaintiffs were fully justified in applying to the Court immediately for an injunction, and that the plaintiffs ought not to be required to make any payment to the defendants in respect thereof, even if it should have happened that at the trial the plaintiffs could not have sustained their claim to a continuance of the injunction. The special circumstances are such that no inquiry as to damages ought to be granted, even if the claim for an injunction could not be sustained at the trial.

In my opinion the appeal and cross-appeal should both be dismissed with costs, with the usual set-off on taxation.

BANKES L.J. In this case the Modern Transport Company, the time charterers of the steamship *Duneric*, sued the Duneric Steamship Company, Limited, the owners of that vessel, claiming an injunction to restrain them from acting on a notice dated November 19, 1915, purporting to determine the charter, and for a declaration

that the charterparty remained valid and binding. In that action the Duneric Steamship Company counterclaimed for a declaration that they were entitled to withdraw the vessel, and that the notice of November 19 was valid and effectual, and that since that date the Modern Transport Company have had no right to any user of the vessel under the charterparty, and they also counterclaimed for the sum of 8627*l.* 0*s.* 9*d.*, the amount which at the date of the counter-claim they alleged to be due for unpaid hire, and for interest thereon. The action was tried before Sankey J., who decided in favour of the Duneric Steamship Company upon the claim for hire and interest, but against them on all the other issues raised upon the pleadings; and he granted an injunction restraining the Duneric Steamship Company from employing the vessel otherwise than in accordance with the terms of the charterparty, or from dealing with the vessel in any way so as to interfere with the Modern Transport Company's right of user of the vessel under the charterparty after the requisition of the Admiralty came to an end. On the counter-claim he entered judgment for the Duneric Steamship Company for 8627*l.* 0*s.* 9*d.* Against this decision both parties appealed.

No question arises in this case as to whether the adventure was determined by the requisition by the Admiralty. The two questions upon which the rights of the parties depend are, first, whether during the time that the vessel was requisitioned payment of hire was suspended; second, whether, in the events which happened, the owners were entitled to take advantage of the clause in the charterparty giving them a right in the event of a failure to pay the hire punctually to withdraw the vessel from the service of the charterers. In my opinion the learned judge was right on both points. The first point is, I think, completely covered by the decision in the *Tamplin Case* (1), where the charterparty was practically identical with the present one, and where the decision proceeded upon the ground that in spite of the requisition by the Admiralty the time charterer continued liable to pay the hire to the owners of the vessel. If the present case is distinguishable from the *Tamplin Case* (1), it is sufficient for me to say that I agree with the construction put upon the charterparty by Sankey J. and for the reasons he has given.

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On the second point I agree with the conclusion arrived at by the learned judge, but upon what are possibly somewhat different grounds. The material facts to be taken into consideration are as follows: The charterparty provided for the payment of hire at the rate of 2350*l.* per month payable in advance in London, with a provision that, failing the regular and punctual payment of the hire, the owners should be at liberty to withdraw the vessel from the service of the charterers without prejudice to any claim they (the owners) might otherwise have on the charterers in pursuance of the charter. The charterparty contained an arbitration clause. The first and second payments of hire, which became due respectively on April 15 and May 15, 1915, were duly paid. On May 21 the vessel was requisitioned by the Admiralty, and service under the requisition began on June 11. Immediately upon the requisition being made the parties were at issue as to the effect of the requisition, the charterers contending (see their letter of May 28) that the charter had become null and void, the shipowners on the other hand insisting that the charter was still a subsisting contract and that the hire continued payable. The question was one of very considerable importance to the parties, as the hire paid by the Government was very considerably less than the amount agreed to be paid by the charterers. The charterers failed to pay the hire due on June 15, and on June 17 the owners' agents wrote to Messrs. Shallet, Dale, & Co. informing them that if this hire was not paid they would be forced to arbitrate in terms of the charter, and on June 30 they wrote to the charterers' solicitors informing them that they were not prepared to give up their rights under the charterparty in respect of arbitration. In July the parties discussed with each other by correspondence the effect of Atkin J.'s decision in the *Tamplin Case* (1), and it is clear that each was maintaining the position they had originally taken up with regard to the effect of the requisition of the vessel by the Government. On July 9 the owners' agents wrote to the charterers intimating that they had appointed their arbitrator as "the matter" must go to arbitration, and on July 15 the charterers' solicitors wrote in reply that the charterers had appointed their arbitrator "in the differences which have arisen between our clients and the Duneric Steamship Company as to the

(1) [1915] 3 K. B. 668.

meaning and intention of the charterparty of March 2, 1915." Under these circumstances it appears to me plain that what the parties agreed to refer to arbitration was not a mere incidental question as to the payment of hire at its due date, but whether the contract between them was or was not a still subsisting contract conferring rights or imposing obligations upon either party. At that time, and for some months after, it suited the shipowners from a business point of view to hold the charterers to their bargain, and accordingly each month down to and including November 15 an unqualified demand was made for each month's hire in advance. Apart from all other considerations the effect of these demands was to waive the forfeiture (if any) which had accrued down to the date of the last demand made. At the time the last demand was made it was known that the Government intended to release the vessel, and the state of the freight market was then such that it would suit the owners better to have control of the vessel than to continue her under the charter. As a result they gave notice on November 18 that unless the charterers paid the overdue hire within twenty-four hours they would withdraw the vessel, and this on November 19 they purported to do. On November 25 the charterers issued their writ claiming an injunction restraining the shipowners from proceeding on this notice, and an interim injunction was obtained. The action came on for trial on December 7 and judgment was delivered on the 10th—that is to say, before the month's hire due on December 15 fell due. In the counter-claim in the action the shipowners claimed the month's hire due in advance on November 15 and recovered judgment for the full amount, and they have since been paid and have received each month's hire as it became due. The only question tried in the action was whether the notice of November 19 was a good notice at the time it was given and effectual to put an end to the charter at that date. In my opinion it was not. The shipowners had submitted to the arbitrators the very question upon which their right to give the notice depended, namely, whether the charterparty was a subsisting contract or not. Until that question was decided by the arbitrators, or the submission revoked, the right of the shipowners to take the law into their own hands and to put an immediate end to the charter was in my opinion necessarily suspended. What had

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been a right under the contract immediately enforceable upon the happening of the events named necessarily ceased to be such a right when the parties had agreed that as a condition precedent to the enforcing of either rights or obligations under the contract by either of them the arbitrators should decide whether the contract itself was a still subsisting one. In my opinion the appeals fail.

A. T. LAWRENCE J. I have had the advantage of reading the judgments which have just been delivered. I agree with them and I have nothing to add.

Solicitors for plaintiffs: *Downing, Handcock, Middleton & Lewis, for Bolam, Middleton & Co., Sunderland.*

Solicitors for defendants: *Holman, Birdwood & Co.*

W. J. B.

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[IN THE COURT OF APPEAL.]

NASH *v.* ROCHFORD RURAL DISTRICT COUNCIL.

[1914 N. 896.]

Local Government — Highway — Successive Highway Authorities — Liability for Acts of Former Authority—Parish Surveyors—Highway Board—Rural District Council—Practice—Admission of Further Evidence in Court of Appeal—Highway Act, 1835 (*5 & 6 Will. 4, c. 50*)—*Highway Act*, 1862 (*25 & 26 Vict. c. 61*), *ss. 11, 39—Local Government Act*, 1894 (*56 & 57 Vict. c. 73*), *s. 25—Rules of the Supreme Court*, 1883, *Order LVIII., r. 4.*

The plaintiff in this case was driving upon a highway within the defendants' district, of which they were the highway authority. His pony suddenly put his foot through the crust of the highway and fell; the plaintiff's arm was broken and his pony injured. He brought an action against the defendants for 170*l.* damages, alleging that the accident was caused by the improper construction by the defendants of a drain under the highway. At the hearing he failed to prove that the defendants had constructed the drain in question, but by arrangement he was allowed, without formal amendment of the pleadings, to contend that the drain was made by the defendants' "predecessors in title" (by which was intended their predecessors in the office of highway authority), and that the defendants were liable for their predecessors' misfeasance. On this question the jury found that the accident was caused by the negligent construction of the drain and that the drain was con-

structed by some of the defendants' predecessors in title, and they assessed the damages at 100*l.* On those findings Lord Coleridge J. entered judgment for the plaintiff. The defendants appealed :—

Held by the Court of Appeal, that, as there was no right of action for damages against a highway authority until actual damage had accrued, the preceding highway authorities were not under any liability which could be passed on to their successors ; and, further, that, on the true construction of the Acts of Parliament creating the successive highway authorities, there was nothing to make any such authority liable for acts of misfeasance committed by its predecessors.

At the close of their argument respondent's counsel applied for leave, under Order LVIII., r. 4, to call further evidence that the defendants had in fact made the drain in question. The action was tried with the jury in February, 1916, and heard on further consideration before the judge on March 29. In the interval some persons residing in the neighbourhood, who had read the report of the case in local papers, offered evidence that the defendants had made the drain. The plaintiff obtained affidavits in May and in July, after the defendants had given notice of appeal, and gave them notice that he should apply to call further evidence, but took no further steps until the appeal came on.

The Court refused the application on the grounds that the plaintiff had not shown sufficient promptness in applying, and that the Court were not satisfied that he could not with due diligence have discovered the evidence before the hearing.

Observations of Lindley L.J. in *In re Copiapo Mining Co.* (1894) 10 Times L. R. 180 ; Annual Practice, 1917, p. 1121, discussed.

ON March 16, 1914, the plaintiff in this action was driving upon a public highway called Hambro Hill, in the parish of Rayleigh in Essex, when his pony's leg broke through the crust of the road at a place where, at some time unknown, a 12-inch pipe drain had been constructed under the highway, carrying water from a ditch on one side of the road to a ditch upon the other. The plaintiff broke his arm and the pony was injured. The plaintiff brought this action for damages against the Rochford Rural District Council, the highway authority for the Rochford district, which included the parish of Rayleigh, claiming 170*l.* damages. The writ was issued on August 14, 1914, but the statement of claim was not delivered until January 23, 1915. Particulars of claim were delivered on March 25, 1915, and defence on April 10, 1915. The case came on for trial at the assizes on February 9, 1916, and the jury found that the accident was caused by the negligent construction of the pipe drain, owing to

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which the water had escaped at the place in question and the soil below the crust of the highway had been washed or sucked away.

The plaintiff's statement of claim in this action alleged that the defendant council had constructed this pipe drain, and claimed damages on the ground that they were responsible for the negligent construction. At the trial the plaintiff failed to prove that the defendants had constructed the drain, but by arrangement made during the trial he was allowed, without any amendment of pleadings, to contend, and the jury found, that the drain was made by the defendants' "predecessors in title," by which phrase it was admitted that they meant "those who preceded the defendants in the office of highway authority." The jury also found that those who made the drain were guilty of negligence, and assessed the damages at 100*l*. On these findings Lord Coleridge J. entered judgment for the plaintiff for 100*l*. The defendants appealed.

The following summary of the statutory provisions on which the argument turned is taken from the judgment of Warrington L.J. :— By s. 11 of the Act of 1862 it is enacted that "all such powers, rights, duties, liabilities, capacities, and incapacities, (except the power of making, assessing, and levying highway rates) as are vested in or attached to or would but for this Act have become vested in or attached, to any surveyor or surveyors of any parish forming part of the district, shall vest in and attach to the highway board." Sect. 39, which provides for the dissolution of a district, defines the consequences in the following terms : "Where any highway district is dissolved, or where any parish is excluded from any highway district, the highways in such district or parish shall be maintained and the provisions of the principal Act" (i.e., the Highway Act, 1835) "in relation to the election of surveyors and all other matters shall apply to the said highways, in the same manner as if such highways had never been included within the limits of a highway district." The Act contains no definition of the word "liabilities," nor, as will be seen from the above citation, was it thought necessary or expedient to provide for the transmission of "liabilities" from the board to the surveyor or to the parish ; the state of things existing before the formation of the district was simply restored.

The Local Government Act, 1894, s. 25, provides that "There shall be transferred to the district council of every rural district all the

powers, duties, and liabilities . . . . of any highway authority in the district . . . . and rural district councils shall be the successors of the highway authority." Under s. 75 expressions used in that Act are, unless the context otherwise requires, to have the same meaning as in the Local Government Act, 1888. By that Act, s. 100, the expression "highway authority" "means as respects a highway district the highway board and as respects a highway parish, the surveyor or surveyors of highways or other officers performing similar duties"; and the expression "liabilities" "includes liability to any proceeding for enforcing any duty or for punishing the breach of any duty, and includes all debts and liabilities to which any authority are or would but for this Act be liable or subject to, whether accrued due at the date of the transfer or subsequently accruing."

Hohler, K.C., and *Naldrett*, for the appellants. The Highway Act of 1835 first gave surveyors the power and imposed on them the duty to repair highways, but no part of the highway was vested in them, and the expression "predecessors in title" has no meaning. If it be taken to mean the successive road authorities who had the control of the roads, the plaintiff must show a sequence of authorities and a passing on of liabilities from each authority to the next.

There is no evidence to show that the drain was not made before 1835, and until the Act of that year was passed the liability to drain the highway was on the adjoining owners and not on any road authority. The drain really forms part of an arterial system of drainage of the surrounding land. If it was made after 1835, there is no evidence to show that it was not made with due care and skill according to the usual method of the time; and if it was so made, *Papworth* v. *Battersea Corporation* (No. 2) (1) is a direct authority that the defendant council is not liable for negligence in not discovering the danger. It is settled that a highway authority is not liable in an action for damages for nonfeasance but only for misfeasance. Assuming there was misfeasance in the original construction of the drain, there is nothing in the successive Acts to pass on the liability from the surveyor of one year to the surveyor of the next, or from the surveyors to the highway board constituted by the Act of 1862,

(1) [1916] 1 K. B. 583.

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nor back to the surveyors after the dissolution of a board, nor from them to the rural district council.

Moreover, there was no cause of action until damage accrued, and, therefore, there was no liability in anybody before the accident to the plaintiff, and no liability could be passed on.

S. A. Hawke, K.C., and *Frank Phillips*, for the respondent. We admit that a highway authority is only liable for misfeasance; but the finding of the jury is that there was misfeasance; for they find that the drain was made on a wrong principle, which must cause a washing away of the soil. It is not correct to say that before 1835 the liability for draining highways was upon the adjoining owners. The Highway Act of 1773 (13 Geo. 3, c. 78), s. 8, imposed such a liability only where cartways, &c., led out of the highway into the lands of such owners. Elsewhere the parish was liable. The actual words of transfer from one authority to another in the successive Acts are not important, because the parish was always liable, and the surveyors, highway board, and rural district council were successively appointed as machinery by means of which the parish could be sued. But in fact the Local Government Act, 1894, s. 25, sub-s. 1, clearly transfers to the rural district council all the liabilities as well as the powers and duties of every highway authority within its district. In *Papworth* v. *Battersea Corporation* (No. 2) (1), which was relied on upon the other side, Neville J. said that he was not satisfied that the liability of the district board did not pass to the corporation without words of transfer; and Bankes L.J. showed that he would have held that the liability did pass had there been words of transfer. That case, therefore, is really in our favour. The scheme of the Act of 1862 is that the highway board only took the place of the surveyors but represented the district instead of the parish. *Reg.* v. *Essex Justices* (2) shows that the dissolution of a highway district does not dissolve the board, but it continues to exist for the purpose of answering its liabilities.

[They then applied for leave under the Rules of the Supreme Court, 1883, Order LVIII., r. 4, to adduce some fresh evidence, which had been offered to the plaintiff by persons resident in the district since the trial, that the drain had been first made by the defendant council. They relied on the judgment of Lindley L.J. in *In re*

(1) [1916] 1 K. B. 583. (2) (1883) 11 Q. B. D. 704.

Copiapo Mining Co. (1) and on *In re H.M.S. Hawke.* (2) The facts as to the evidence proposed to be produced sufficiently appear in the following judgments.]

LORD COZENS-HARDY M.R. This application raises a curious point. The material facts are very short. An accident happened to the plaintiff by reason of a hole in a road alleged to have been caused by a drain. The defendants are the present highway authority. The statement of claim raises the case in this way: The defendants, the highway authority, carelessly and negligently constructed the drain and they are liable in damages. That was the only issue according to the pleadings. Two witnesses were called on the part of the plaintiff to prove that this drain had been put in in the defendants' time, that time beginning in 1895—a modern time, about which there could be no difficulty in getting evidence. The necessity of that proof was apparent, because interrogatories were administered by the defendants to the plaintiff asking at what time he said this drain had been made by the defendants. The answer was "I cannot tell until I get discovery." He never asked for and never obtained discovery. He called two witnesses into the box to prove this part of his case. One of them, the plaintiff himself, was about fifty years of age, the other about sixty-nine; both lived close to the locus in quo, and had lived there all their lives, but neither of them could remember when the drain was made. There was, therefore, not a particle of evidence to support the only issue which was pleaded. But then, by some arrangement not in question now, without amending the statement of claim or raising the issue very distinctly, the action was tried upon the footing that the drain was put in by some of the defendants' predecessors in title, as they are called—that is, some of the prior highway authorities. On that issue there was evidence taken, and also evidence as to negligence. The question was submitted to the jury and the jury found in these terms: (Q.) "Did the defendants cause the drain to be constructed?" (A.) "No." Upon the evidence, that has not been challenged and could not be challenged.

(1) 10 Times L. R. 180.

(2) (1912) 28 Times L. R. 319. The case is also reported, but not on this point, in [1913] P. 214, sub nom. *The Olympic and H.M.S. Hawke*, and [1915] A. C. 385, sub nom. *Owners of Steamship Olympic* v. *Blunt*.

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Lord Cozens-Hardy M.R.

It was the one material issue in the action as originally started, and the arrangement which was made did not in any way entitle the plaintiff to hark back afterwards upon that issue upon which he had failed. The matter was heard at the assizes on February 8, 1916, and it was adjourned for further consideration, and came on in London before Lord Coleridge J. on March 29, and he then gave judgment in favour of the plaintiff. In the interval between February 8 and March 29, the assize case having been fully reported in the local journals, the plaintiff's solicitor heard that there were two people in the neighbourhood—I suppose they volunteered—who could make some statement which might help the plaintiff on that point. Notice of appeal was given by the defendants some time in May. Then in July the plaintiff's solicitor informed the defendants' solicitors that they desired to adduce further evidence on this point in the Court of Appeal. The defendants' solicitors very wisely did not take any notice of it. We are now asked, nearly at the end of November, on the assumption that apart from further evidence the plaintiff would fail, to allow him to adduce further evidence in support of this case. It is within our power, no doubt, to do so on special grounds, but this is a jurisdiction which ought to be exercised with the greatest possible care, particularly in a case where the issue between the parties has been decided by a jury. The suggestion is that we should have affidavit evidence here to induce us to say that the verdict of the jury was wrong. That is a proposal which it seems to me ought to be very carefully scanned.

In the case which was relied on by Mr. Hawke of *In re Copiapo Mining Co.* (1), Kay L.J. said that if the application before him had been one for a new trial, which was a somewhat analogous proceeding, it was impossible to suppose that it would have been granted. It was not suggested that there had been any surprise, or that any new fact had been discovered which could not have been discovered before. Is there anything more in this case than there was in that? I think not.

Some language has been greatly relied on by Mr. Hawke which was used in that case by Lindley L.J. I have no doubt that the decision there, which was against the admission of further evidence, was perfectly right; but, with the most unfailing respect for anything

(1) 10 Times L. R. 180.

that fell from Lindley L.J., I venture to think that his statement, which I will read, goes further than is warranted by the principle; it is (1): "Under Order LVIII., r. 4, leave to admit further evidence was only given on special grounds. In his Lordship's opinion, if the Court thought that the case had been decided on insufficient evidence, and that the evidence proposed to be adduced would be sufficient to enable the Court to discover the truth, that would be a special ground within the meaning of the rule, but that was not the case here." That, it will be remembered, was a case in which there had been no jury, but it was an appeal from North J., under the perfectly well known procedure under s. 35 of the Companies Act, to rectify the register by taking off one name and putting on another. Even in that case I venture to think it would be dangerous, and tend to a want of finality in all the proceedings of the Court, to admit further evidence merely on the ground that it would give more satisfactory proof of what took place. Moreover it must have been present to his Lordship's mind that in that case the Court of Appeal, if the evidence had been admitted, would have been in exactly the same position as the Court below. The Court below had affidavit evidence and cross-examination, not in the presence of the Court, but before one of the examiners or a commissioner. The further evidence they were asked to admit was again affidavit evidence, which would be subject to cross-examination in the same manner. In this case we should not be, and could not possibly be, in the same position as the Court below. That being so, it seems to me on that ground alone we should be making a very dangerous precedent if we were to say this application ought to be acceded to. But apart from that, I think in the present case it is quite beyond doubt that the application ought not to be acceded to upon another ground. The plaintiff knew what is alleged by these witnesses in February, 1916; he knew it at the time of the notice of appeal, six months ago; and he did not make any application to the Court as he might have done, nor ask for a new trial; but he comes here now and makes this application, which deals with the only issue raised in the action as first framed, and which everybody knew must be of extreme importance.

I think we ought not to allow the application.

(1) 10 Times L. R. 181.

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WARRINGTON L.J. I am of the same opinion. The plaintiff went to trial to prove that the drain in question had been negligently constructed by the defendants themselves. He did not allege as an alternative that it had been negligently constructed by some other road authority preceding the defendants in that capacity. At the trial the plaintiff's witnesses were himself, being a man of about fifty years of age, and a man named Whittam, who was of the age of sixty-nine. They had both lived in the neighbourhood all their lives and said they could not remember when the drain was made. On the other side the defendants called two surveyors who had held office from the year 1895 down to the present time, each of whom swore positively that the drain had not been constructed in his time. Thereupon, of course, the plaintiff saw that it was hopeless to persist in the allegation on which he went to trial; and by some arrangement it was agreed that an alternative case might be made, if he could make it—namely, that the drain had been constructed by a previous road authority, to whose position the present defendants had succeeded. The result of the trial was that the jury found as a fact that the drain had not been made by the defendants; and they came to other findings, as the result of which the learned judge entered judgment for the plaintiff.

The action was tried at the assizes on February 8. A report of the case appeared in the local papers, as reports of such cases usually do, within a day or two after the trial, with the result that two persons, who think they know a great deal more about it than had been told to the judge and jury, come forward and say "We could tell you when that drain was laid." I will assume that the result of what they can prove, if they are believed, will be to show that the plaintiff was right after all, and that the drain was made by the road authority. An application is now made to adduce further evidence at the very last moment, only when the case comes on for hearing by the Court of Appeal, and after the plaintiff has strongly submitted to us that on the verdict as it stands he is entitled to the judgment which Lord Coleridge J. has given. It seems to me it would be most dangerous to allow this evidence to be adduced now at this last moment. To begin with, I cannot believe that if reasonable inquiries had been made in the neighbourhood the plaintiff would have been unable to obtain the evidence which it is now said he can

obtain—evidence which, if believed, puts the question beyond dispute. But more than that, I think when he knew that he had got that evidence, and when he knew the verdict was against him on that one issue, and that the defendants were not applying for a new trial but were content to take the verdict as it stands, then he ought to have applied at once to the Court of Appeal for leave to adduce this further evidence which he now seeks to adduce.

For two reasons, first that I think it would be extremely dangerous to admit further evidence in such a case as this, and secondly that I think the plaintiff comes now much too late with his application, that application ought, in my opinion, to be refused.

SCRUTTON L.J. I have had some doubt as to the result of this application, but I have come to the same conclusion as my learned brothers, for these reasons.

The principle which I have to apply is, I think, the principle stated by Lord Chelmsford in the case of *Shedden* v. *Patrick* (1) in these words: "It is an invariable rule in all the Courts, and one founded upon the clearest principles of reason and justice, that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting a new trial." That is the principle which was acted upon by this Court in the first application in the case of *H.M.S. Hawke.* (2) I take the reason of it to be that in the interests of the State litigation should come to an end at some time or other; and if you are to allow parties who have been beaten in a case to come to the Court and say "Now let us have another try; we have found some more evidence," you will never finish litigation, and you will give great scope to the concoction of evidence. In the particular case of *The Hawke* (2), to which I have referred, the Court of Appeal did admit the evidence; and they admitted it for two reasons which are stated by Vaughan Williams L.J. in the Court of Appeal (3): "We have admitted the evidence of the

(1) (1869) L. R. 1 H. L. Sc. 470, 545.
(2) 28 Times L. R. 319.
(3) [1913] P. 239.

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finding of the wreckage on the ground that it is relevant and material to the decision of the action by the *Olympic* against the *Hawke*, and also having satisfied ourselves that the search for the wreckage was not postponed by the *Olympic* taking their chance of winning their case independently of any search for wreckage." That is to say, the Court thought there had been due diligence on the part of the persons who were seeking to adduce the new evidence.

Now in this case the plaintiff went to trial on his pleading on an allegation that a particular road authority had been guilty of negligence in the construction of a drain. At the trial the plaintiff and another witness, who both lived near to the place, could give no evidence as to when the drain was constructed, and the jury found positively that the defendants did not cause the drain to be constructed. The plaintiff now wants to give evidence that the finding of the jury was wrong and that the defendants did cause the drain to be constructed. He had that evidence very shortly after the trial, but he did not apparently mention it to Lord Coleridge J. when the matter came on for further consideration. Two months after the notice of appeal he mentioned it to the other side, but he mentioned it to this Court for the first time yesterday. I should be sorry to lay down any principle which would prevent the Court of Appeal from getting at the truth where the conditions I have stated are fulfilled. What evidence the Court will admit must depend very much on the circumstances of each case and how far the evidence could have been obtained before the trial by the party who seeks to adduce it with proper diligence. For instance, within the last year or two years there has been an action for breach of promise brought by a lady against a man, where the lady got a verdict; information then came to the knowledge of the defendant that the lady was already married, and was married at the time she alleged the promise was made. The Court at once admitted that evidence, because it was not evidence that the man could be expected to know of, and the Court were satisfied that he could not have obtained the evidence before the trial. In this case the plaintiff and one of his witnesses lived quite close to this drain, and they did not know when it was made. We are not told who the persons are who profess to say that they do know when it was made, or where they live. The farther off they live, the less valuable, probably, their

evidence is; the nearer they live, the more easy it was to find them. In view of that fact I am not satisfied that by reasonable diligence the plaintiff could not have found this evidence before; and I am not satisfied that when he found it he used reasonable diligence to make it clear that he wanted to upset a finding of the jury which had been obtained in the action. I am quite clear that the evidence as stated would be material; but I think the application to give it should be refused, on the ground that the plaintiff has not shown that with due diligence he could not have discovered it before, and has not used due diligence in bringing it to the notice of the Court.

Hohler, K.C., in reply upon the general case.

Cur. adv. vult.

Dec. 7. LORD COZENS-HARDY M.R. (after stating the facts as above). The action was launched on the footing that the drain had been constructed by the defendants. There was no evidence to support this allegation, and the jury have expressly negatived it. By an arrangement made in the course of the trial, without any amendment of the pleadings, the jury were asked whether the defendants' "predecessors in title" caused the drain to be constructed, and the answer of the jury was "Yes." Judgment was entered for 100*l.* damages.

It is admitted that mere negligence in omitting to repair will not support an action against a rural district council for damages: *Cowley* v. *Newmarket Local Board.* (1) There is no evidence, and certainly no finding, when the drain was laid, or by what authority. The successive road authorities were as follows: (*a*) 1835 to 1863, parish surveyors under the Highway Act, 1835; (*b*) 1863 to 1881, a highway board under the Act of 1862; (*c*) 1881 to 1895, parish surveyors, the highway board having been dissolved; (*d*) 1895 to present time, the defendants under the Act of 1894.

It seems to me that the plaintiff is in great difficulty by reason of his inability to ascertain which of the authorities laid down the drain. It is not the defendants, but it may have been laid down during (*a*), (*b*), or (*c*), and possibly by some authority prior to 1835. Mr. Hawke boldly argued that the parish is the body which is

(1) [1892] A. C. 345.

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represented by all the authorities, and that the defendants are liable for all the consequences of any misfeasance, however many years ago, by any one of the successive highway authorities. I am unable to assent to this argument. Assume that the drain was laid down some time between 1835 and 1895. The construction of the drain, however negligent, gave no cause of action until the accident to the plaintiff. Damage is a necessary part of the cause of action. There was no legal liability until damage accrued. It is like the right of support, where a man by excavating on his own land lets down his neighbour's house. There is no legal wrong in the mere excavating not followed by damage to the house. So a false and fraudulent representation, not followed by damage, gives no cause of action.

The plaintiff relies upon s. 25, sub-s. 1, of the Act of 1894, by which there was transferred to the defendants "all the powers duties and liabilities" of "any highway authority" in the district, and they were made "successors of" the highway authority, i.e., of the surveyors of the parish. And the plaintiff relies upon the definitions of "highway authority" and "liabilities" in s. 100 of the Local Government Act, 1888, which definitions are made applicable to the Act of 1894 by s. 75. In my opinion there is nothing in s. 100 which so enlarges the meaning of liabilities as to include a case like the present.

This is not a "liability to any proceeding for enforcing any duty or for punishing the breach of any duty." And the subsequent words relate only to pecuniary obligations.

It follows, therefore, that the defendants are not liable to damages for a negligent act before 1895 which did not result in damage until after 1895. In my opinion the judgment cannot be supported, and the appeal must be allowed and judgment entered for the defendants.

WARRINGTON L.J. The defendants, the Rochford Rural District Council, are the highway authority for their district, which includes the parish of Rayleigh. In this parish is a highway called Hambro Hill. There has at some time been constructed under the highway a 12-inch pipe drain carrying water from a ditch on the south-west side thereof to one on the north-east side, the drain thus acting

incidentally as a highway drain. The plaintiff met with an accident owing, as he contended and as the jury have found, to the negligent construction of the drain, and sues the defendants for damages occasioned thereby.

It is conceded that the defendants as a highway authority are liable in damages for an act of misfeasance only, not for mere nonfeasance: *Cowley* v. *Newmarket Local Board.* (1) Accordingly the plaintiff in his statement of claim alleged that the defendants themselves had caused the drain to be constructed. It was found at the trial that he would be unable to prove this, but he was allowed to make the case that it had been constructed by a previous road authority, for whose acts it was contended the defendants were liable as if they were their own. The jury found that the defendants did not cause the drain to be constructed, but that the defendants' predecessors in title did so. The expression "predecessors in title" is not an accurate one, but it clearly means "those who preceded the defendants in the office of highway authority." On these findings, together with affirmative findings as to negligence, Lord Coleridge J. entered judgment for the plaintiff for 100*l.*, the damages awarded by the jury.

The point raised on this appeal is that the learned judge was wrong in treating the misfeasance of the preceding authority as equivalent to the misfeasance of the defendants themselves, so as to enable a person who suffers injury in consequence thereof to recover damages from the defendants.

The highway in question has been under the control of a number of different authorities, and the jury do not find, and in fact there was no evidence enabling them to find, by which in particular of the several authorities, other than the defendants, the drain was constructed. [His Lordship then stated the effect of the various Highway Acts as above, and continued:]

As I have pointed out, the jury have not identified the predecessor by whom the negligent act was committed, but I will suppose for the moment that it was the surveyor, or one of the surveyors, in office during the years 1881 to 1895. Would the provisions of the Act of 1894 render the district council liable for the consequences of the negligent act of the surveyor? To so hold

(1) [1892] A. C. 345.

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would, I think, be inconsistent with the doctrine now well established that a highway authority is responsible for misfeasance only, and though of course it is competent to Parliament to abolish that doctrine altogether, or to make it inapplicable where the act of misfeasance is that of a preceding authority, I do not think one ought to hold that such a result has happened unless the words are clear. In the present case I cannot find either in s. 25 or in the definition in s. 100 any sufficient intention to pass on the responsibility for a wrongful act not their own and by itself affording no cause of action. The preceding authority was not in fact under any liability inasmuch as the damage essential to the existence of liability had not arisen.

If I am right on the construction of the Act of 1894 it is unnecessary to go further, for in the Act of 1862, s. 39, there was no transfer of liability from the district board to the surveyor, and the words in s. 11 transferring the liabilities of the surveyor to the board were not so strong as the corresponding expression in the Act of 1894 as interpreted by the definitions in the Act of 1888.

I think it would require much clearer words than either statute contains to render the incoming body liable for the consequences of a wrong not committed by itself. The reference to punishment affords a further argument in favour of the construction I have adopted, for it can hardly be supposed that Parliament intended to render an authority liable to punishment for something done by another. On the whole I think the appeal ought to be allowed and judgment entered for the defendants.

SCRUTTON L.J. stated the facts and continued: By a long line of authorities from *Russell* v. *Men of Devon* (1) to *Cowley* v. *Newmarket Local Board* (2) it is clear that the defendants were not liable in a civil action for nonfeasance as distinguished from misfeasance, and that therefore, even if they knew of the negligent construction and consequent hole, but did nothing, no liability would attach to them. But for some reason the jury were asked if the defendants were negligent in not observing and remedying the defect, and they answered "Yes." Question and answer were immaterial and superfluous.

(1) (1788) 2 T. R. 667. (2) [1892] A. C. 345.

On further consideration the learned judge held that there was evidence on which the jury could find that some road authority constructed the drain, with which I agree. He further said: "Without going into the Acts and statutes and sections in detail, I am of opinion that the language in each case is sufficiently wide to cover the construction placed upon them by the plaintiff, namely, that the authority in each case was responsible for the acts of misfeasance of the predecessors in title." This, though satisfactory to the plaintiff, does not help the Court of Appeal much as to the grounds of the learned judge's decision. It is therefore necessary to examine the facts and statutes with some care.

The defendants, the Rochford Rural District Council, came into existence by virtue of the Local Government Act, 1894, in 1895. In 1881 a previously existing Rochford Highway Board, constituted under the Highway Act of 1862, had been dissolved, and from 1881 to 1895 the surveyors of the parish of Rayleigh had been the road authority. Before 1862 surveyors of the parish of Rayleigh had also been the road authority—since 1835 under the Highway Act of 1835; before that date under the Highway Act of 1773. Each surveyor held office for a year. One of these authorities, and there was no evidence which, had been negligent in the construction of the drain. But no damage had been caused by that negligence up to the year 1895, when the defendant rural board came into existence; and, therefore, no previous authority had been "liable," in the ordinary legal sense of the word, to any one for negligence. For, as was pointed out by Lord Blackburn in *Darley Main Colliery Co.* v. *Mitchell* (1), you may be as negligent as you like, no cause of action or liability arises till your negligence does damage. But the plaintiff suggests that by the statutes an authority which has done nothing and is indeed not liable for doing nothing (which is non-feasance) is liable for something done by a predecessor if that act causes damage during the reign of the latter authority. And further that the latter authority may be liable, by transmission of liability, through an intermediate authority who itself did nothing, and in whose reign no damage occurred, but who is yet supposed to have a liability derived from its predecessor's negligence to pass on.

(1) (1886) 11 App. Cas. 127,

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I turn to examine the statutes which are supposed to have worked this result; and it is sufficient in the first instance to see what statutes transferred liability from the surveyors of the parish of Rayleigh in 1894 to the Rochford Rural District Council in 1895. Sect. 25 of the Local Government Act, 1894, transfers to the rural district council all the powers, duties, and liabilities of any highway authority in the district. By s. 67, where any powers and duties are transferred by this Act from one authority to another authority, (1.) all property held by the first authority for the purpose by virtue of such powers and duties shall pass to and vest in the other authority subject to all debts and liabilities affecting the same. (3.) All debts and liabilities of the first authority incurred by virtue of such powers and duties shall become debts and liabilities of the latter authority. Sect. 100 of the Local Government Act, 1888, defines "liabilities" to include liability to any proceeding for enforcing any duty or for punishing the breach of any duty, and includes all debts and liabilities to which any authority are or would but for this Act be liable or subject to, whether accrued due at the date of the transfer or subsequently accruing. And s. 75 of the Local Government Act, 1894, provides that expressions used in this Act shall, unless the context otherwise requires, have the same meaning as in the Local Government Act, 1888; thus incorporating in the sections quoted the definition of liability already set out.

The question is whether a previous authority who has done a negligent act causing no damage has any "liability," as above defined, to pass on to a subsequent authority, so that on damage occurring due to that negligence the subsequent authority, which itself has done nothing and is not liable for nonfeasance, becomes liable to an action for negligence. The question would not be confined to an action for negligence. Where an excavation on land ultimately causes damage on adjoining land, there is no cause of action till damage ensues, and the Statutes of Limitations run from the occurrence of damage: *Backhouse* v. *Bonomi*. (1) And other examples can easily be suggested. I cannot think that negligence not causing damage involves a "liability" in the ordinary legal sense, or in the sense of the interpretation clause, either a "liability to any proceeding for enforcing a duty," or "a liability to which

(1) (1861) 9 H. L. C. 503.

any authority would but for this Act be liable or subject to whether accrued due at the date of the transfer or subsequently accruing." The latter words point to bills of exchange and similar obligations where a liability arises from acceptance accruing due at a future date. Indeed, as the definition of " liability " includes liability to punishment, it should obviously be construed strictly.

It was argued that it was desirable to treat the various authorities as one succession representing the parish, each authority liable as representing the one continuous parish. But I gather Rayleigh parish is not the same as the area of Rochford District Council ; and if it were, it is not the duty of the Courts, (who are bound by the rule of *Cowley* v. *Newmarket Local Board* (1) to hold that highway authorities are not liable for nonfeasance,) to make generous constructions of the words of statutes in order to defeat that rule. If it is to be altered, it must be altered by Parliament, which has at present allowed it to stand unaltered for many years.

I may add that the decisions in the much litigated case of *Papworth* v. *Battersea Corporation* (No. 2) (2) (latest stage) do not touch this point.

The question here, whether negligence not followed by damage can create a " liability " to be transferred, was not argued or decided in that case.

The judgment appealed from must be set aside and judgment entered for the defendants with costs here and below. In view of the fact that the plaintiff failed entirely on the pleadings on which he went to trial, I do not see my way to give him the costs of any matters decided in his favour.

Solicitors for appellants : *Kingsford, Dorman & Co., for Gregsons & Powell, Southend.*

Solicitors for respondent : *Lawton & Taylor, for W. Bygott, Rayleigh, Essex.*

(1) [1892] A. C. 345. (2) [1916] 1 K. B. 583.

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[1916 N. 83.]

Maintenance of Suit—Maintained Action successful—Liability of Maintainer—Limited Company—Damages.

An action for maintenance of a suit will lie although the maintained action has been decided in favour of the plaintiff, and in that case the damages recoverable in the action for maintenance will be the costs ordered to be paid by the defendant to the plaintiff in the maintained action and the costs, as between solicitor and client, incurred by the defendant in defending that action.

A limited company may be liable for maintenance.

Dictum of Lord Selborne in *Metropolitan Bank* v. *Pooley* (1885) 10 App. Cas. 210 discussed.

Further Consideration of an action tried by the Lord Chief Justice and a special jury.

The defendants were the proprietors and publishers of a daily newspaper called the *Daily Express* circulating throughout England and Wales. Shortly before January, 1916, the plaintiff Neville, trading as the South Coast Land and Resort Company, promoted and advertised a prize competition, by which a prize of 100*l.* was offered for the most suitable name for a "new south coast estate," and in addition fifty free plots of land on the estate were offered as consolation prizes, subject to a proviso that the winners of these consolation prizes paid three guineas for a deed of conveyance. The prize of 100*l.* was divided between two competitors who had submitted "New Anzac-on-Sea" as a name for the estate.

The competition was criticized in a series of articles published in the *Daily Express*, which alleged, in substance, that the competition was not a bona fide one, that far more than fifty consolation prizes had been awarded, and that the plots of land were of little or no value. It was stated in some of the articles that the defendants were prepared to instruct their solicitors to take legal proceedings, at the defendants' expense, on behalf of persons who had been awarded plots of land as consolation prizes and who had paid the sum of three guineas for a deed of conveyance, for the recovery of these sums, and all persons desiring to get their money back were

invited to send their names to the defendants' solicitors. As a result 125 persons joined together in two actions brought in the Chancery Division [1916 B. 411] and [1916 P. 245] against Neville claiming the return of the money paid by them on the ground that they had been induced to pay the money by the fraudulent misrepresentation of Neville. The defendants' solicitors acted for the plaintiffs. These actions came on for trial before Younger J. Before the plaintiffs' case had been opened Neville's counsel stated that he would submit to judgment for the sums paid, but counsel for the plaintiffs contended that he was entitled to open the case. Younger J. held that he was entitled to do so, and Neville's counsel, acting on his client's instructions, then withdrew from the case. The trial of the action then proceeded, and in the result Younger J. gave judgment for 114 of the plaintiffs (eleven having withdrawn) for the return of the money paid by them, with costs.

In the present case the plaintiff alleged that the articles in the *Daily Express* were defamatory of him and that the actions in the Chancery Division had been maintained by the defendants. The statement of claim alleged (inter alia) that "the defendants maliciously and with intent to injure the plaintiff procured divers persons . . . . to join in and bring two actions in the Chancery Division of the High Court of Justice and to permit the use of their names for the purpose of the said actions being brought against the plaintiff and the defendants have maliciously and with such intent as aforesaid maintained the said persons in the said actions and in the bringing and conduct thereof and have paid and are paying the costs of the said persons in and in relation thereto."

The defendants by their defence, after traversing these allegations, pleaded alternatively that "the said actions were proper and necessary actions brought in the public interest as well as in the interests of the said persons, and the defendants were entitled to maintain the said persons in the said actions inasmuch as it was their public duty to do so, or, alternatively, because they bona fide believed that it was their public duty to do so, and also because they acted out of charity and benevolence towards the said persons who were unable to bear the expenses and costs of the said actions."

The jury found for the plaintiff on the question of libel, with damages 300*l.*

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On the claim for maintenance the following questions were left to the jury :—

1. (*a*) Did the defendants act from the desire to assist persons to prosecute claims who would not otherwise have been able to enforce their rights ?

(*b*) Did the defendants act solely from this desire ?

2. Did the defendants act in the bona fide belief that the persons who sued had a well-founded claim against Neville ?

The jury answered all the questions in the negative.

It was agreed by the parties that the amount of the damages, if any, recoverable on the claim for maintenance should be determined by the learned judge.

E. M. Pollock, K.C., and *Hugh Fraser*, for the defendants. The defendants are entitled to judgment on the claim for maintenance. Where the action alleged to have been maintained has been decided in favour of the plaintiff an action for maintenance will not lie against a person who has assisted in the prosecution of the action. The main ingredient in maintenance is the instigation of litigation without reasonable or probable cause : *Pechell* v. *Watson* (1) ; *Flight* v. *Leman* (2) ; *Oram* v. *Hutt*. (3) If the litigation is successful it cannot be said that there was a want of reasonable and probable cause. Secondly, the action of maintenance only lies where there is proof of actual damage : *Metropolitan Bank* v. *Pooley*, per Lord Selborne. (4) Here there is no evidence of damage. The costs in the Chancery actions were incurred because the present plaintiff chose to defend an action to which there was no defence : *Harold* v. *Smith*. (5) Lastly, an action for maintenance will not lie against a corporation : *Metropolitan Bank* v. *Pooley* (6) ; *Cornford* v. *Carlton Bank* (7) ; *Oram* v. *Hutt* (8), per Lord Parker. In cases of civil wrongs, such as libel or malicious prosecution, a corporation is no doubt liable for the acts of its officers and servants acting within the scope of their authority, but maintenance, as Lord Selborne pointed out in *Metropolitan Bank* v. *Pooley* (6), is " a wrong founded upon a prohibition by statute which makes it a criminal act and a mis-

(1) (1841) 8 M. & W. 691.
(2) (1843) 4 Q. B. 883.
(3) [1914] 1 Ch. 98.
(4) 10 App. Cas. 210, 219.
(5) (1860) 5 H. & N. 381.
(6) 10 App. Cas. 218.
(7) [1899] 1 Q. B. 392.
(8) [1914] 1 Ch. 103.

demeanour," and therefore, he says, "the civil action for maintenance would not lie except against a person who was guilty of the criminal act." A corporation could not be guilty of the criminal act.

Lewis Thomas, *K.C.*, and *H. Dobb*, for the plaintiff. The action for maintenance is not the creation of statute. Maintenance was always a misdemeanour at common law, and therefore a tort as regards the particular individual affected. Lord Selborne's observations in *Metropolitan Bank* v. *Pooley* (1) were directed to the case of a company in liquidation and have no application to the case of a company not in liquidation which is carrying on a business and which may be liable for the acts of its servants in maintaining a suit just as much as in cases of libel or malicious prosecution: *Abrath* v. *North Eastern Ry. Co.* (2) Maintenance consists in the instigation of, or interference in, a suit in which the person so acting has no interest. It is malum in se, not malum prohibitum: *Wallis* v. *Duke of Portland* (3), per Lord Loughborough. It is immaterial that the maintained action may have been successful: *Bradlaugh* v. *Newdegate.* (4) *Scott* v. *National Society for the Prevention of Cruelty to Children* (5) is a recent instance of a case in which damages were held to be recoverable for maintenance although the maintained proceedings, an appeal from a bastardy order, had been successful. The expression "want of reasonable and probable cause" when used in connection with the action of maintenance means without lawful excuse on the part of the maintainer: *Alabaster* v. *Harness.* (6) The plaintiff is entitled to an indemnity from the defendants for the whole expense which their maintenance of the Chancery actions has caused him to incur: *Bradlaugh* v. *Newdegate.* (7)

E. M. Pollock, *K.C.*, replied.

VISCOUNT READING C.J., after stating the facts, continued as follows: It is, I confess, with some reluctance that I feel constrained to hold that the defendants, who have assisted persons to enforce successfully their legal rights to the recovery of money, are liable to be mulcted in damages for having given that assistance, but I have

(1) 10 App. Cas. 210.
(2) (1886) 11 App. Cas. 247.
(3) (1797) 3 Ves. 494, 502.
(4) (1883) 11 Q. B. D. 1.
(5) (1909) 25 Times L. R. 789.
(6) [1895] 1 Q. B. 339.
(7) 11 Q. B. D. 15.

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to decide this case in accordance with the broad principles of the law of maintenance as laid down in the authorities.

It is contended on behalf of the defendants, first, that they cannot be held liable for maintenance unless I come to the conclusion that they had no reasonable or probable cause for believing in the justice and legal right of the claim of the plaintiffs in the Chancery actions. I am unable to accept that argument. It is mainly based on some observations in *Pechell* v. *Watson* (1) and *Flight* v. *Leman*. (2) It is correct to say, as Mr. Pollock has contended, that in the latter case the plaintiff failed because there was no allegation of a want of reasonable and probable cause. But the question turns on the meaning of the expression "reasonable and probable cause" in this connection. In my opinion it means nothing more than the absence of some lawful justification or excuse, and a plaintiff in order to succeed in an action of maintenance must prove not only that the defendant has assisted in the bringing of the suit but that he has done so without lawful justification or excuse. If that is the meaning there is no doubt that the defendants had no lawful justification for assisting the plaintiffs in the Chancery actions, for the only excuse put forward by them has been negatived by the verdict of the jury. I do not agree with the contention that the present action must fail unless the defendants had no reasonable or probable cause for believing in the rights of the plaintiffs in the Chancery actions.

The next point taken on behalf of the defendants is that, even if maintenance has been proved, the action will not lie without proof of actual damage, and it is said there is none. This is the part of the case which has given me most trouble, and I am not now altogether relieved from anxiety as to the view which I am about to pronounce, but I am at least supported in that view by some judicial authority.

The action of maintenance is based on the officious intermeddling in suits, and the rule was thus stated by Lord Loughborough in *Wallis* v. *Duke of Portland* (3): "Parties shall not by their countenance aid the prosecution of suits of any kind; which every person must bring upon his own bottom and at his own expense"; and observations to a similar effect were made by Lord Abinger C.B. in

(1) 8 M. & W. 691. (2) 4 Q. B. 883.

(3) 3 Ves. 502.

Prosser v. *Edmonds* (1), which were quoted by Lopes L.J. in *Alabaster* v. *Harness*. (2) Again, in the more recent case of *Scott* v. *National Society for the Prevention of Cruelty to Children* (3) Bray J. held that "the cases showed that it was immaterial what the result might be. It was the wanton intermeddling that was the cause of action."

I ought, I think, to refer to the observations of Lord Esher M.R. in *Alabaster* v. *Harness* (4), where he said: "It seems to have been thought that litigation might be increased in a way that would be mischievous to the public interest if it could be encouraged and assisted by persons who would not be responsible for the consequences of it, when unsuccessful"; but I do not think that Lord Esher intended it to be inferred that if the action was successful an action for maintenance would not lie, because he proceeded to quote the well-known passage from Lord Loughborough's judgment in *Wallis* v. *Duke of Portland* (5) which I have already read; and in *Bradlaugh* v. *Newdegate* (6) it was accepted, though not decided, by Lord Coleridge C.J. that in an action for maintenance damages are recoverable irrespectively of whether the suit instigated by the maintainer has or has not been successful. I therefore come to the conclusion that there is abundant authority to show that in this case the plaintiff is entitled to recover damages notwithstanding that in the Chancery actions against him the plaintiffs were successful.

It was contended for the plaintiff that maintenance is malum in se and not merely malum prohibitum, and that he is therefore in any event entitled to some damages; but, having regard to the opinion which I have formed as to the amount of damages recoverable in this case, it is not necessary to decide that point.

Before dealing with the quantum of damages I must refer to one other contention urged on behalf of the defendants, namely, that an action for maintenance will not lie against a limited company. In support of that view the very high authority of Lord Selborne is relied on. In *Metropolitan Bank* v. *Pooley* (7) Lord Selborne said: "In my opinion the corporation, the Metropolitan Bank, was incapable of maintenance." If that statement means that the bank

(1) (1835) 1 Y. & C. Ex. 481.
(2) [1895] 1 Q. B. 344.
(3) 25 Times L. R. 789, 791.
(4) [1895] 1 Q. B. 342.
(5) 3 Ves. 502.
(6) 11 Q. B. D. 1.
(7) 10 App. Cas. 210, 218.

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could not be prosecuted for maintenance, no question can be raised as to its accuracy; but if, as contended, it means that a civil action cannot be brought against a limited company which, by its servants, has been guilty of maintenance, I do not think that this is the present state of the law. But I do not think that Lord Selborne's statement need affect my decision in this case, because he was considering the case of a company which was in liquidation, and he relied on the limited authority possessed by the liquidator of a company in liquidation as justifying the view which he expressed. It is quite clear that a limited company may be held liable for the acts of its servant which it authorizes, if the servant has improperly carried out the authority which the company could and did give. In the present case the defendants could give authority to their servants to carry on the business of a newspaper, and the person entrusted by the defendants with the control of the newspaper was, according to the facts as found by the jury, guilty of maintenance in the course of the newspaper campaign which he carried on against the plaintiff. In these circumstances I therefore feel bound to hold that the defendants are responsible for the acts of their servant and are liable in damages for maintenance.

With regard to the amount of damages which the plaintiff is entitled to recover, in both *Bradlaugh* v. *Newdegate* (1) and *Scott* v. *National Society for the Prevention of Cruelty to Children* (2) it was held that the plaintiff was entitled to recover an indemnity from the person who was responsible for setting in motion the litigation against him. I therefore propose to give to the plaintiff the costs incurred by him in defending the Chancery actions as between solicitor and client, and also the costs as between party and party which he was ordered to pay to the plaintiffs in those actions. The amount must be ascertained by taxation in the ordinary manner, and when the amount has been ascertained judgment will be entered for that amount.

Judgment for plaintiff.

Solicitors for plaintiff: *Vaughan & Williams.*

Solicitors for defendants: *Carter, Harrison & Armstrong.*

(1) 11 Q. B. D. 1. (2) 25 Times L. R. 789.

F. O. R.

[IN THE COURT OF APPEAL.]

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Nov. 17, 20, 21, 23.
Dec. 6.

BANBURY *v.* BANK OF MONTREAL.

Banker—Negligence—Duty to advise Customer as to Investment—Authority of Manager—Liability of Bank—Parol Representation as to Credit—Statute of Frauds Amendment Act, 1828 (*Lord Tenterden's Act*) (9 *Geo.* 4, *c.* 14), *s.* 6.

The plaintiff in 1911 went to Canada on pleasure and stayed at Montreal with the general manager of the defendant bank, who gave him a letter of introduction to the branch managers asking them if he applied for assistance or advice to place themselves at his disposal. In 1912 he again visited Canada, seeking investments, and amongst other places went to V., where he called upon G., the defendants' branch manager, upon whose advice, as he alleged, he invested the sum of 25,000*l.* upon a mortgage to secure a loan to a Canadian company who were customers and debtors of the bank. The advice alleged to have been given to the plaintiff by G. consisted of oral representations as to the credit of the company and the merits of the investment. It was admitted that G.'s advice was honestly given. The company having failed to pay either interest or principal, the plaintiff brought an action against the bank, claiming damages for negligence and breach of duty while acting as his bankers and advisers. There was evidence that the bank did not, and according to the law of Canada could not, advise as to investments, and it was admitted that G. had no general authority to do so:—

Held, that the letter of introduction addressed by the general manager to the branch managers did not give G. any special authority to advise the plaintiff, and that in the absence of any such authority there was no breach of any duty to advise carefully, and therefore no negligence which rendered the bank liable.

Held, also, that the action was brought by reason of a representation or assurance as to the credit of the company, and as such representation or assurance was not in writing signed by the party to be charged therewith, as required by s. 6 of Lord Tenterden's Act, the action was not maintainable.

The application of s. 6 is not confined to fraudulent representations or representations such as would support an action of deceit.

Haslock v. *Fergusson* (1837) 7 Ad. & E. 86 and *Swann* v. *Phillips* (1838) 8 Ad. & E. 457 followed.

APPLICATION for judgment or a new trial on appeal from verdict and judgment at trial before Darling J. and a special jury.

The plaintiff in the action, Captain Banbury, alleged that

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the defendants, the Bank of Montreal, recommended to him a certain security on which he invested a sum of 25,000*l.*; that they undertook the duty of exercising reasonable skill and diligence in advising him in reference thereto; that they failed to perform that duty, but on the contrary were guilty of negligence in making orally certain commendatory statements on the faith of which he parted with the above-mentioned sum, and that he had suffered loss; and he accordingly sued the defendants for damages.

The defendants were a corporation carrying on business as bankers with a head office in Montreal and branch offices in London and in many other places, including Victoria in the Province of British Columbia.

At the time of the events giving rise to this action a man named Galletly, now dead, was manager of the Victoria branch of the defendant bank. In the year 1912 a company called the Westholme Lumber Company was a customer of the defendants at their Victoria branch. They were indebted to the bank in a sum of 200,000 dollars and interest, secured by a mortgage of lands and chattels belonging to them. They were also indebted to the Royal Trust Company, a close connection of the bank, in a sum of 25,000 dollars, also secured by mortgage of the same property. They had some time previously entered into a contract with the city of Victoria to construct certain waterworks, and in connection with that contract they had incurred a debt with a firm called Simon Leiser & Co. amounting to 25,000 dollars for goods supplied and services rendered, which debt was also secured by a mortgage on the same property. Their account at the bank was overdrawn, but such overdraft was to some extent covered by the moneys payable to them by the city for instalments of the contract price.

The transaction the subject of this action was the loan by the plaintiff to the Westholme Company of a sum of 25,000*l.* (125,000 dollars) bearing interest at 8½ per cent. on the security of a mortgage by the company of the land in mortgage to the bank and the trust company and subject to their mortgages. The mortgage contained a personal covenant on the part of two of the directors of the company to pay the mortgage debt and interest and a provision that the plaintiff should be entitled to 12½ per cent. of the profits of the Victoria contract. It was also provided that the mortgagors

should use the 125,000 dollars for no other purpose than for expenses incurred, and to be incurred, in the construction of the said water supply. The debt owing to Simon Leiser & Co. was paid out of the money advanced by the plaintiff, and the plaintiff's mortgage was therefore subject only to the mortgages to the bank and the trust company; these the plaintiff admitted were regarded as one mortgage for the purpose of the transaction in question.

The circumstances under which the plaintiff entered into the mortgage transaction were as follows: In 1911 the plaintiff visited Canada on a pleasure excursion, staying in Montreal with Sir Edward Clouston, the general manager of the bank there, and he had some general conversation with him on the subject of investments in Canada. Sir Edward gave him a letter of introduction to the branch managers generally, which was dated July 6, 1911, and was in the following terms:—"Dear Sirs,—I take pleasure in introducing to you Captain Banbury, of London, England, who is visiting this country on pleasure. Should he apply to you for assistance or advice you will be good enough to place yourselves at his disposal. Yours faithfully, E. S. Clouston, General Manager. The Branch Managers, Bank of Montreal." He went on this occasion to Victoria, but did no business there and did not present the letter.

In 1912 the plaintiff again visited Canada, this time with a view of investing money. He again stayed with Sir Edward Clouston. No fresh letter of introduction was given, but it was understood that he might, if he pleased, use the one given the year before.

In Montreal, and again in Vernon on his way to Victoria, he carried through certain financial transactions the details of which are immaterial. For the purpose of one of these transactions—the loan of money to a fruit-growing company in Vernon—he opened an account with the branch of the bank in that place. He arrived in Victoria on September 6, and on the 7th he called on Mr. Galletly at the bank there, presenting his letter of introduction. Mr. Galletly had that day received from a Mr. Cartwright, a well-known engineer, a report of an encouraging nature on the prospects of the profitable conclusion of the water contract of the Westholme Company. This report had been obtained by Mr. Galletly in consequence of a difference of opinion between him and Mr. Sweeny, the bank's superintendent of branches for British Columbia, on the

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subject, Mr. Galletly taking a sanguine view of the position of the company and Mr. Sweeny a less favourable one. The particular form of investment for which the plaintiff was looking was the purchase of agreements for sale of real estate, and he accordingly asked Mr. Galletly if he knew of any such to be had. Mr. Galletly replied in the negative, but asked him if he would in the meantime consider an industrial proposition. The plaintiff objected to this as being too speculative, but Mr. Galletly replied that there was nothing speculative about the one he had in mind. He then proceeded to give an account of the Westholme Company and its contract, and made certain commendatory statements in regard thereto, of which the plaintiff now complained as being inaccurate and made negligently. He also gave to the plaintiff Mr. Cartwright's report and put him in communication with the officials of the company. The result was that on September 11 the plaintiff agreed to lend the company 125,000 dollars on the terms afterwards embodied in the mortgage.

The plaintiff left Victoria the next day, making arrangements for providing the money for the loan and for its payment through the Victoria branch to the company and for the collection by the same branch of his interest. The mortgage was prepared by a lawyer employed by the plaintiff on Mr. Galletly's recommendation, was executed on September 13, was posted to the plaintiff in England on October 4, and received by him on the 24th. The plaintiff's 25,000*l.* was duly advanced to the company.

For reasons which were unforeseen at the date of the advance the company failed to carry out its water contract. The plaintiff was left with his mortgage alone as security for his money. This security was now of doubtful value.

On March 10, 1914, the plaintiff issued his writ in this action.

The main case made by the statement of claim was that the bank, as part of their business, advised their customers with regard to Canadian investments; that at the time in question the plaintiff was a customer and consulted the defendants as to investing money in Canada; that they advised the particular investment, making certain statements in support of such advice; that such advice was given negligently and unskilfully and was acted on by the

plaintiff, who claimed damages for the loss occasioned thereby. As to the mortgage of Simon Leiser & Co. the plaintiff alleged that the defendants negligently and in breach of their duty to him did not advance his money on second mortgage, but without any instructions or authority from him allowed his money or a part thereof to be used to pay off the said mortgage to Simon Leiser & Co., thus in effect making his security subject not only to the mortgages of the bank and the Royal Trust Company, but also to that of Simon Leiser & Co. The defendants denied that Galletly had given the plaintiff any advice, but said that he had merely supplied him with information as to the company, and that the plaintiff had exercised his own judgment in making the advance. As to the Simon Leiser Company's mortgage the defendants said that, even if the plaintiff was not aware of it at the time he took his security, he subsequently ratified the transaction, and the payment off of the 25,000 dollars out of the money advanced by him was in accordance with the terms of his mortgage, which provided that his money should be used for no other purpose than for expenses incurred, and to be incurred, in the construction of the water supply. The defendants further said that if Galletly had given the plaintiff any advice in the matter he had acted outside the scope of his authority as branch manager, and that they were not liable to the plaintiff. It was admitted that if any such advice as alleged had been given by Galletly it was given honestly and in good faith.

The action was twice tried, first by the Lord Chief Justice, when the jury disagreed, and secondly by Darling J. At the second trial the jury found (1.) that Galletly had authority as the manager of a branch to advise the plaintiff to make the investment; (2.) that Galletly did advise the plaintiff (*a*) that the investment was perfectly safe, (*b*) that the mortgage would be a second mortgage ranking only behind a first mortgage held by the bank, (*c*) that the money was required and would be used only for the purpose of completing the particular water supply contract, and (*d*) that with the loan the lumber company would be able easily to carry out their contract without further borrowing; (3.) that the plaintiff relied on the advice so given and invested his money on the strength of it. They accordingly awarded to the plaintiff 25,000*l.* damages and added to their verdict the following rider: "All securities to be returned to

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the bank." Upon these findings Darling J. gave judgment for the plaintiff. The defendants appealed.

Sir John Simon, K.C., and *W. N. Raeburn*, for the appellants. First, we submit that the defendants owed no duty to the plaintiff. Secondly, if they did, there was no evidence of negligence and no breach of duty. Thirdly, the bank manager, Galletly, had no authority to advise the plaintiff so as to render the bank liable. Fourthly, as to Leiser's mortgage, assuming that the plaintiff did not know that his money was to be partly applied in paying it off, he afterwards ratified and adopted the transaction. Fifthly, Darling J. in his summing-up omitted to direct the jury properly as to the defendants' evidence or as to the question of damages. Lastly, the action was brought " by reason of " oral representations as to the credit or ability of the Westholme Company within s. 6 of Lord Tenterden's Act (1) and therefore must fail. For these reasons the defendants are entitled to judgment or a new trial.

It is outside the functions of a bank manager to advise customers how to invest their money. Mr. Galletly never did advise the plaintiff to make the investment in question. All he did was to bring the parties together, and the plaintiff made his own investigations and decided to accept the security offered, so that even if there was any duty to advise there was no breach of any such duty. Moreover the plaintiff was not at the time of the advance a customer of the branch which was managed by Galletly. He had had an account at the Vernon branch for the purpose of making a previous investment. He merely paid into that branch the money which he was then investing and drew it out when the investment was made. That did not make him a customer of the bank in the sense that the manager of another branch was under any duty to advise him.

Further, we submit that Galletly had no special authority from

(1) 9 Geo. 4, c. 14, s. 6, "No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon [*sic*] unless such representation or assurance be made in writing, signed by the party to be charged therewith."

the bank to advise the plaintiff. The letter of July 6, 1911, gave him no such authority. There can be no negligence unless a duty is established: *Le Lievre* v. *Gould* (1); *Great Central Ry. Co.* v. *Hewlett.* (2) Here there was no duty upon Galletly, and still less upon the bank, to advise the plaintiff, and even if there was a duty there is no evidence of any negligence. It is undisputed that it is no part of the ordinary business of bank managers to give such advice, and it is equally undisputed that at the time when the advice is alleged to have been given there was no contractual relation between Galletly, as manager of the defendants' Victoria branch, and the plaintiff.

[SCRUTTON L.J. Even if Galletly did give advice, was there any duty upon him to exercise care?]

There was no duty which will raise a case of negligence.

[LORD COZENS-HARDY M.R. referred to *Low* v. *Bouverie.* (3)]

Here, in the absence of any contractual relationship between the parties, there was no duty. [*Metropolitan Ry. Co.* v. *Jackson* (4) was referred to.]

Again, Galletly, if he did advise the plaintiff, was not acting within the scope of his authority so as to bind the bank. It is suggested that the bank was specially interested in the success of the Westholme Company, who was their debtor. But it cannot be that it is part of the general duty of every branch manager dealing with a customer who has an overdraft to use all means to induce others to put him in funds. There is really no evidence of authority. Again, with regard to the Leiser mortgage, assuming that the plaintiff was not told about it when he went to Victoria, it was thoroughly known to him afterwards and he affirmed the transaction.

Finally, the defendants are entitled to succeed upon the point under Lord Tenterden's Act. This is an action in which it is sought to charge the bank "by reason of representations or assurances" made or given concerning or relating to the credit and ability (i.e., financial ability) of the Westholme Company "to the intent or purpose that such other person"—that is, the Westholme Company —"may obtain credit money or goods." The section provides that no action can be brought on such representations or assurances

(1) [1893] 1 Q. B. 491.
(2) [1916] 2 A. C. 511.
(3) [1891] 3 Ch. 82.
(4) (1877) 3 App. Cas. 193.

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unless they are " made in writing signed by the party to be charged therewith." There is no reference to fraud in the section, and it cannot be that because the Act is an amendment of the old Statute of Frauds therefore it does not apply to a case where no fraud is alleged.

In most if not all of the cases which illustrate the application of this section there were allegations of fraud. But there is nothing in the section which limits its application to cases where there is fraud. Further, it may be pointed out that whereas s. 4 of the old statute speaks of charging a person upon a series of things, the language of s. 6 of Lord Tenterden's Act is wider and speaks of charging any person " upon or by reason of " a representation or assurance, and it is clear that the plaintiff here is endeavouring to charge the bank " by reason of representations or assurances " within the section.

[SCRUTTON L.J. The general view is that Lord Tenterden's Act was an attempt to remedy what was supposed to follow from the decision in *Pasley* v. *Freeman*. (1)]

However that may be, the question is, what is the effect of the statute ? It does not follow that it is limited to remedying the mischief against which it was directed. The Act does more than that, and its language completely covers this case. The following cases are applicable : *Swann* v. *Phillips* (2) ; *Devaux* v. *Steinkeller* (3) ; *Clydesdale Bank* v. *Paton* (4) ; *Haslock* v. *Fergusson* (5) ; *Swift* v. *Jewsbury* (6) ; *Hirst* v. *West Riding Union Banking Co.* (7) The Act was extended to Scotland by the Mercantile Law Amendment Act, Scotland, 1856 (19 & 20 Vict. c. 60), s. 6, and the House of Lords in *Clydesdale Bank* v. *Paton* (4) have explained the meaning of it.

[SCRUTTON L.J. referred to *Lyde* v. *Barnard*. (8)]

In *Lyde* v. *Barnard* (8) the judges were divided upon the question whether the representation there came within the statute as a representation relating to the character, conduct, credit, &c., of a particular person, or whether it was as to the value of a particular asset of that person. There was no question whether it made any

(1) (1789) 3 T. R. 51.
(2) 8 Ad. & E. 457.
(3) (1839) 6 Bing. N. C. 84.
(4) [1896] A. C. 381
(5) 7 Ad. & E. 86.
(6) (1874) L. R. 9 Q. B. 301.
(7) [1901] 2 K. B. 560.
(8) (1836) 1 M. & W. 101.

difference whether the statement was honestly or fraudulently made. It is submitted that the defendants are entitled to judgment, but alternatively we say that having regard to the summing-up of the learned judge there ought to be a new trial. He did not properly direct the jury as to damages. All he said was that there was no dispute as to damages. The jury were asked what the damages were, and the answer which they gave to the question "What damages, if any?" was "25,000*l.*, and all securities to be returned to the defendant bank." Moreover, in his summing-up the learned judge only read the plaintiff's evidence-in-chief to the jury and did not draw their attention to the defendants' evidence at all. [They also referred to the notes to *Chandelor* v. *Lopus*. (1)]

Gordon Hewart, K.C., *Douglas Hogg*, and *S. L. Porter*, for the respondent. This advice was given by Galletly acting in his capacity of manager in the business of the bank, and in a matter in which the bank was interested pecuniarily. The bank therefore had a duty towards their customer Banbury. It was part of the bank manager's business to advise a customer of the bank on a particular investment in which the bank was interested. He knew quite well the state or condition of this company and that its failure would cause serious injury to the bank. In his summing-up in the first trial the Lord Chief Justice indicated that it was not only a legitimate but an obvious inference that the bank manager was acting within the scope of his authority. It was his duty to look after the interests of the bank, and it was while he was engaged on a transaction in which the bank was interested and acting within the scope of his authority that he gave this advice. The letter of introduction clearly referred Banbury to the bank manager for advice.

The next ground of appeal is that there was no evidence of negligence to go to the jury. The plaintiff was a customer of the bank.

[*Sir John Simon, K.C.* I admit that he was a customer of the bank at Vernon, but he had no account at and was not a customer of the Victoria branch.]

We submit he was a customer of the Bank of Montreal. The position or status of branch banks is that "in principle and in fact

(1) (1603) 2 Sm. L. C., 11th ed., p. 59.

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they are agencies of one principal banking corporation or firm, and the few decisions which have taken place with respect to them are consistent with this view": *Prince* v. *Oriental Bank Corporation.* (1) So here, with an account at the Vernon branch, the respondent was a customer of the bank at its head office. That being so, if the bank by itself or through its authorized manager takes upon itself the function of adviser, it or he must exercise reasonable care and skill. The respondent produced his letter of introduction referring to "advice" in the matter of investment, and the bank manager, assuming the part of adviser and acting in a matter in which the bank was interested, was bound to use reasonable care, and if he did not do his duty in that respect he was guilty of negligence. On the evidence the bank manager failed in his duty. If he had put before the respondent all that he himself knew the respondent would never have taken this investment.

As to the point under Lord Tenterden's Act, it is admitted that whenever a representation coming within s. 6 forms an ingredient in the cause of action the action is not maintainable unless the representation is in writing. But here the representations relied on form part of the evidence which goes to support the charge of negligence, and as such are admissible. Although the Act has been in force for ninety years and has constantly been the subject of judicial discussion, there is no case where it has been successfully pleaded in an action of contract.

In *Swift* v. *Jewsbury* (2) both Lord Coleridge C.J. and Bramwell B. say that s. 6 is directed against fraudulent representations. In *Haslock* v. *Fergusson* (3) there was no contractual relationship between the parties. In *De La Bere* v. *Pearson, Ld.* (4) the point under Lord Tenterden's Act was not taken, although the case was elaborately argued. The representations in this case were not as to the credit or ability of the Westholme Company. No doubt such a representation within the statute might be implied, but short of that there was none. In *Tatton* v. *Wade* (5) there were two representations, one written and one oral.

(1) (1878) 3 App. Cas. 325, 332.
(2) L. R. 9 Q. B. 301.
(3) 7 Ad. & E. 86.
(4) [1908] 1 K. B. 280.
(5) (1856) 18 C. B. 371.

Assuming that Galletly had authority to advise the plaintiff, he, in effect, said to him "If you will invest money on this security I will give you sound advice as to it." That amounts to a warranty that if the plaintiff took the advice it would be reliable.

[LORD COZENS-HARDY M.R. referred to *Low* v. *Bouverie.* (1)]

There was no contractual relationship there. [They also referred to *Williams* v. *Mason* (2), *Hayes* v. *Tindall* (3), *Bishop* v. *Balkis Consolidated Co.* (4), and *Whitehead* v. *Greetham.* (5)]

Sir J. Simon, K.C., in reply. The representations here relied on clearly related to the credit and ability of the Westholme Company. Upon the question of duty or authority to advise, for some purposes the different branches of a bank ought to be regarded as separate entities: *Clode* v. *Bayley* (6); *Clare & Co.* v. *Dresdner Bank* (7); *Woodland* v. *Fear* (8); *Prince* v. *Oriental Bank Corporation* (9); *Bank of the Republic* v. *Millard.* (10) As to there being no evidence of breach of duty, see *Hammack* v. *White* (11), *Cotton* v. *Wood* (12), and *Metropolitan Ry. Co.* v. *Jackson.* (13)

Cur. adv. vult.

Dec. 6. LORD COZENS-HARDY M.R. In this action the plaintiff, Captain Banbury, claims damages against the Bank of Montreal for negligence and breach of duty while acting as the bankers and advisers and agents of the plaintiff. There have been two trials. In the first trial, before the Lord Chief Justice and a special jury, the jury could not agree. In the second trial, before Darling J. and a special jury, judgment for 25,000*l.* was obtained by the plaintiff. On the second trial additional evidence was produced and a new point of law was raised. The defendants now appeal and ask for (*a*) judgment and (*b*) a new trial.

It is necessary to state concisely the circumstances which gave rise to the action. The plaintiff was a member of the Stock Exchange. In 1911 he went to Canada and stayed in Montreal

(1) [1891] 3 Ch. 82.
(2) (1873) 28 L. T. 232.
(3) (1861) 2 F. & F. 444.
(4) (1890) 25 Q. B. D. 77, 512.
(5) (1825) 2 Bing. 464.
(6) (1843) 12 M. & W. 51.
(7) [1915] 2 K. B. 576.
(8) (1857) 7 E. & B. 519.
(9) 3 App. Cas. 325.
(10) (1869) 10 Wall. 152.
(11) (1862) 11 C. B. (N.S.) 588.
(12) (1860) 8 C. B. (N.S.) 568.
(13) 3 App. Cas. 193.

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with a friend, Sir E. S. Clouston, the general manager of the Bank of Montreal, who gave him a letter on bank paper in the following terms: [The Master of the Rolls read the letter and continued:] At that time Captain Banbury was not a customer of the bank, and he did not during that visit make any investment in Canadian securities. It has been faintly argued that the letter was an instruction to all the branch managers to give advice on investments. In my opinion it is no more than a letter of introduction given to a stranger who was visiting Canada on pleasure.

In 1912 Captain Banbury made a second visit to Canada, partly with a view to investing in Canadian securities. He took Sir E. Clouston's 1911 letter of introduction with him and called at the Victoria branch of the bank, of which Galletly was local manager. A conversation, or rather several conversations, took place between Galletly and Captain Banbury. Galletly is dead, and there is no possibility of a direct challenge of Captain Banbury's version, which has been accepted by the jury. After these conversations, and, as is alleged, in consequence of the advice given by Galletly, Captain Banbury agreed to advance, and did advance, 25,000*l.*, or 125,000 dollars, to a lumber company which has failed to pay either interest or principal. The mortgage was to carry interest at $8\frac{1}{2}$ per cent. and Captain Banbury was to have a share of profits. In March, 1914, the writ in this action was issued. The statement of claim alleged in paragraph 1 that the defendants carry on business as bankers in London and Canada "and as such advise their customers with regard to Canadian investments." It alleged in paragraph 2 that the defendants by their agent and manager, Galletly, orally advised the plaintiff to invest 125,000 dollars on mortgage to the lumber company, and in paragraph 4 that the advice so given was negligent and unskilful. The jury found: [The Master of the Rolls read the findings of the jury and continued:]

Now it is plain that the action must fail unless Galletly had authority to advise the plaintiff so as to bind the bank. There was evidence given on the part of the defendants that the bank does not and, according to the law of Canada, cannot advise as to investments. There was no cross-examination on this point, and counsel for the plaintiff in plain terms admitted that Galletly had no general authority to advise as to investments. Mr. Gordon Hewart, in

answer to questions put by the learned judge at the trial, said: "I am not for a moment suggesting, nor is it necessary to suggest, a general authority in Mr. Galletly to advise at large about investments"; and similar observations were made several times in the course of the trial. His authority, if any, must be a special authority. There is not a trace of any such special authority having been given in this particular case. It is urged, however, that in any case in which the bank has granted an overdraft to a customer, whether secured by mortgage or not, it must be for the benefit of the bank that money should be procured by the customer so as to enable the bank's debt to be reduced or the bank security to be improved, and that in any such case the local manager must be taken to have implied authority to assist the customer, and for that purpose to make representations to an intending lender. In the absence of any evidence to support this theory of implied authority I decline to accept it.

I do not propose to go through the lengthy correspondence or the voluminous evidence taken on commission to establish a negative. In my view the first and vital finding of the jury cannot be supported, and on that ground I think judgment ought to be entered for the bank. It is right that I should say that no fraud is imputed, and that Mr. Galletly's honesty is not questioned. On the other hand it is not suggested that Captain Banbury did not believe what he said in the witness-box as to the conversations with Galletly.

This is sufficient to dispose of the appeal. But we have had a long and interesting argument upon s. 6 of Lord Tenterden's Act, which it is said prevents the action from being maintained because the representation or assurance is not in writing signed by the party to be charged therewith. And as this case may go elsewhere, I think it right to express my opinion upon the point. Sect. 6 is in the following words: "That no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon [*sic*] unless such representation or assurance be made in writing signed by the party to be charged therewith." It is

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important to observe (1.) that in addition to the word "upon" there are the words "or by reason of," and (2.) that the section applies only to a certain class of representations. I assume for the present purpose that the findings of the jury as to Galletly's authority and as to the advice given by him to Captain Banbury are correct. Do not they amount to an "assurance" "concerning or relating to" the "credit," "ability," and "trade" of the lumber company "to the intent or purpose" that the lumber company might "obtain" money from Captain Banbury? I think they do. Unless, therefore, I am bound by authority, I think the present case falls within s. 6. There are a good many authorities since 1828, and it is not easy to reconcile them all. In *Lyde* v. *Barnard* (1) there was a division of opinion upon the question whether a particular representation or assurance was as to the credit of a person or only as to the value of a particular asset of that person. In the present case I feel no such difficulty. Shortly afterwards the Court of Queen's Bench in *Haslock* v. *Fergusson* (2) and in *Swann* v. *Phillips* (3) held that the section applied to an action of assumpsit and prevented the plaintiff from giving in evidence the parol representation necessary to support the assumpsit. In my opinion we ought to follow these decisions of the Queen's Bench. The language of the section is perfectly general. It is not to be confined to a fraudulent representation, or to such a representation as would have justified an action of deceit.

It follows that in my opinion the plea of Lord Tenterden's Act is an answer to Captain Banbury's action, which must fail without proof of Galletly's verbal representations or assurances.

I have purposely abstained from dealing with many other points raised in the arguments before us. I will only add that if I had taken a different view upon both the points upon which I hold the bank entitled to judgment I should have held a new trial must be granted.

WARRINGTON L.J. stated the facts as above set out and said that far too much importance had been attributed to the letter of July 6, 1911. The advice and assistance mentioned were, in his opinion, such advice and assistance as a person travelling for pleasure would

(1) 1 M. & W. 101. (2) 7 Ad. & E. 86.
(3) 8 Ad. & E. 457.

be likely to require and nothing more. The Lord Justice continued : The plaintiff's action is founded on negligence, and negligence alone ; there is no suggestion that Mr. Galletly acted fraudulently or dishonestly. In such a case the plaintiff, in order to succeed, must first establish the existence of a duty on the part of the defendants towards him to exercise reasonable skill and diligence in the matter in question. See on this point *Low* v. *Bouverie* (1), in which it was held that a trustee, who, in answer to inquiries made by a stranger to the trust as to incumbrances on the fund, honestly and to the best of his belief gave a reply which was in fact untrue, was not liable for loss thereby occasioned, on the ground that no contractual relation binding the trustee to give accurate information existed as between him and the stranger. See also *Le Lievre* v. *Gould.* (2)

Was there in the present case any evidence of the existence of such a duty ? The plaintiff founds his case on the statement that it was part of the business of the bank to advise its customers in regard to Canadian investments. The only evidence on the point disproves this allegation. The bank do not undertake as part of their business to give such advice to customers. Moreover, assuming a practice of advising customers, the plaintiff was not at the time in question a customer of that branch of the bank at which the advice was given ; the relation of banker and customer did not exist as between Mr. Galletly and him. There was nothing, therefore, in the general relations between the parties to give rise to the alleged duty. Did the special circumstances of the present case give rise to it ? For the purpose of dealing with this question I will assume that Mr. Galletly acted within his authority as manager of the bank. But in my opinion the facts establish no more than this, that Mr. Galletly, being asked as a person having presumably some experience in such matters whether he knew of any investments of a particular character, voluntarily mentioned the investment in question as one of a different character but one which the plaintiff might be willing to accept, and honestly recommended it for his acceptance. I cannot see how, under such circumstances, Mr. Galletly can properly be said to be in any contractual relation with the plaintiff, and if he were not, then of course neither was the bank.

(1) [1891] 3 Ch. 82. (2) [1893] 1 Q. B. 491.

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I am of opinion, therefore, that there was no evidence of the existence of the duty essential to support a claim founded on negligence.

But if this view is incorrect, and if upon the assumption of sufficient authority the defendants did come under an obligation to the plaintiff to use skill and diligence in advising him, then arises the question whether Mr. Galletly in fact had sufficient authority to bind the defendants by his action in the matter. The question on this subject left to the jury and their answer are as follows: "Had Mr. Galletly authority as a manager of the branch of the defendant bank to advise the plaintiff to invest 125,000 dollars on mortgage to the Westholme Lumber Company?—Yes." Was there any evidence sufficient to justify such a finding? There was no evidence of express authority, nor was it contended that Mr. Galletly by virtue of his position as manager of the Victoria branch possessed a general authority. The contention is that in this particular matter he had on other occasions actively interfered, in one instance with a view to obtaining an advance of money to the company and in another with a view to obtaining on their behalf concessions from the city in reference to the payment of the retention moneys under the contract; that this was done in the interests of the bank and with the knowledge and approval of Mr. Galletly's superior officers; and from this it must be inferred that Mr. Galletly had sufficient authority in the particular case to take the steps in relation to the plaintiff which he actually took. In support of this contention reliance is placed on the correspondence between Mr. Galletly and Mr. Sweeny and the head office in the spring and summer of 1912. I have carefully considered this correspondence as it was read to us more than once. I cannot find that it records any act of his which would be likely to involve the bank in any liability, nor does it appear that any officer of the bank capable of conferring the necessary authority was aware of, and still less approved of, Mr. Galletly's action in the matter. It was suggested that Mr. Galletly might be treated as having authority to do what he did for the reason that his action was in the interests of the bank and for the preservation of the security. Without going so far as to say that in no case, where some step was urgently necessary in order to preserve or protect the security of the bank, would Mr. Galletly

have had authority to take that step, I cannot see that what he did in the particular case could come within that class of actions. On the whole I am of opinion that there is no evidence to support the finding of the jury as to authority.

On these grounds, therefore,—(1.) that the bank were under no such obligation as is essential to support the plaintiff's case and (2.) that there was no evidence of Mr. Galletly's authority—I think judgment ought to have been entered, and ought now to be entered, for the defendants.

There is a further point taken by the defendants by amendment at the second trial which, if a good one, is fatal to the plaintiff's case. The alleged negligence consists in the giving by Mr. Galletly to the plaintiff without the exercise of due care and skill of certain oral assurances in reference to the sufficiency of the security and the prospects of repayment of the money advanced which turned out to be inaccurate. The defendants contend that the action is brought by reason of those assurances, that they were assurances given concerning or relating to the credit or ability of the company, and that under Lord Tenterden's Act (9 Geo. 4, c. 14), s. 6, no such action can be brought unless the assurance be made in writing and signed by the party to be charged therewith.

The first question is, were the assurances given in the present case such as are described in the statute? A similar question was raised in *Lyde* v. *Barnard*. (1) In that case the plaintiff alleged that he was induced to advance to Lord Edward Thynne a sum of money for the purchase of an annuity from him secured by his personal obligation and by assignment of his life interest in certain trust funds. It was represented by the defendant, who was one of the trustees of the fund, that the life interest was subject to three annuities only, whereas in fact it was also charged with a mortgage for 20,000*l*. The judges were divided in opinion, Lord Abinger and Gurney B. taking the view that the representations were within the statute as being representations as to the ability of Lord Edward Thynne to perform his contract; Alderson B. and Parke B. taking the view that the statute applied only to representations as to the general credit or ability of a person, and not as to the value of a particular item of property offered as security. In the present case

(1) 1 M. & W. 101.

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the representations or assurances alleged to be made or given by Mr. Galletly to the plaintiff, taken one by one, have relation, as to some of them, to the sufficiency of the proposed security, and as to others to the prospect of a successful carrying out of the contract in question. But in my opinion the proper mode of dealing with the matter is to look at what was said as a whole and then to say whether it was a representation or assurance concerning or relating to the character, conduct, credit, ability, trade, or dealings of the company. I am of opinion that the question must be answered in the affirmative in the present case. The general intent of the statements was to induce the plaintiff to believe not only that the security would be sufficient, but that the company would be able to complete their contract and earn the profits in which the plaintiff was to share. If profits were to be earned, moneys advanced for the purposes of the contract must first be paid, and thus the ability to perform the contract imports an ability to pay the plaintiff's debt without recourse to the security. Having regard to the passage in Parke B.'s judgment in *Lyde* v. *Barnard* (1), I believe he would have taken the same view had the facts in that case been the same as in the present. See also *Swann* v. *Phillips*. (2)

Then arises the second question: Is this an action brought to charge the defendants upon or by reason of the representation or assurance? It is said it is not, because the cause of action is the breach of the supposed duty above referred to, of which breach the representation or assurance is but evidence. I am of opinion, however, that to take that view is to ignore the expression "by reason of" and to treat the section as if it had been confined to actions brought upon a representation. It may be and it probably is the fact that the main object of the section was to meet the then common evasion of the 4th section of the Statute of Frauds as to promises to answer for the debt of another person by framing the claim in tort upon a fraudulent representation as to credit, but this consideration ought not, in my judgment, to limit the effect of the Act if the words used carry the matter further. In the present case the making of the representation is of the essence of the plaintiff's claim. It could never have arisen without it. Therefore

(1) 1 M. & W. 116.

(2) 8 Ad. & E. 457.

I think the action is brought *by reason* of the representation, though perhaps not in the strict sense *upon* it.

On the whole, then, I am of opinion that the point raised by amendment is a sound one and is fatal to the plaintiff's case.

The subsidiary point raised as to the payment to Simon Leiser is, I think, easily answered. The debt was for expenses incurred in the construction of the water supply and was therefore, under the terms of the mortgage, properly paid out of the plaintiff's loan.

It is unnecessary, in the view I take, to say anything as to the application for a new trial, and I abstain from doing so, except that it must not be supposed that I am satisfied with the mode in which the case was dealt with, and particularly in reference to damages.

In my opinion the appeal ought to be allowed and judgment entered for the defendants with costs here and below except so far as the payment of costs in any event was a condition of leave to amend.

SCRUTTON L.J. This is an appeal from a verdict and judgment for 25,000*l.* damages obtained by the plaintiff, Captain Banbury, against the defendants, the Bank of Montreal, in an action tried before Darling J. and a Middlesex special jury. The Bank of Montreal appeal and ask for judgment, or in the alternative a new trial.

The material facts are as follows, and in stating them, in view of the defendants' application for judgment, as far as possible I adopt the plaintiff's story, which the jury have obviously accepted. Captain Banbury, who was not then a customer of the Bank of Montreal either in England or Canada, was in 1911 a guest in Canada of Sir Edward Clouston, the general manager of the Bank of Montreal. As he was going west, Sir Edward gave him a letter dated July 6, 1911. [The Lord Justice read the letter and continued:] Captain Banbury at the trial assented to a leading question of his junior counsel that the letter was the result of a conversation as to the investment of money in Canada. The letter itself, which only speaks of Captain Banbury as visiting the country "for pleasure," is inconsistent with this. Be this as it may, Captain Banbury did not use the letter in 1911. He returned in

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1912, meaning to invest some of his wife's money (75,000 dollars) in Canada. [The Lord Justice then referred to the financial transactions carried out by the plaintiff previously to his visiting Victoria, and continued:] He then went with Sir E. Clouston's letter of introduction to Mr. Galletly, manager of the Victoria branch of the Bank of Montreal, where he had then no account, and asked the manager if he could put him on to some agreements for sale, namely, of land with purchase price unpaid. Mr. Galletly said he did not know of any, but would inquire. But Mr. Galletly then said he would put before Captain Banbury an industrial proposition, namely, a proposal to finance, in part, a contract for the water supply of the city of Victoria then being carried out by the Westholme Lumber Company. The city were holding back as a retention fund 40 per cent. of the sums due under this contract for certificates on work done, and the contractors obviously therefore needed financing. Captain Banbury was told by the manager that the Royal Trust Company and the Bank of Montreal had advanced some 225,000 dollars to the Westholme Lumber Company on this contract on the security of certain mortgages on real property and floating charges on chattels, but more money was wanted. Captain Banbury saw Mr. Cameron, of the lumber company, and an arrangement was come to by which Captain Banbury was to advance the Westholme Lumber Company 125,000 dollars on the security of a mortgage of the real property to follow that of the bank and the Royal Trust Company. The bank's witnesses said the arrangement was negotiated between Captain Banbury and the representatives of the lumber company without Mr. Galletly doing more than to introduce the business and show to Captain Banbury a report from Mr. Cartwright, an engineer whom the bank had instructed to report on the water contract and advise them as to the probabilities of its going through successfully. Captain Banbury said that the manager negotiated for him and advised him to make the investment of 125,000 dollars, on which he was to receive 8 per cent. interest and 12½ per cent. of the profits, which on the figures of Cartwright's report would show some 40 per cent. profit on the sum he was investing. And this member of the London Stock Exchange told the jury that he was only there to invest and wanted nothing speculative in his 40 per cent. investment. The jury have found

that Galletly advised Captain Banbury that the investment was perfectly safe and that with the loan the lumber company would be able to carry out their contract without further borrowing. The transaction was completed in less than a week, and Captain Banbury went east again, his mortgage being sent after him. The unexpected then happened. The city of Victoria became short of money and was unable to pay the certificates for work done, and the contractors, who not only had their 40 per cent. retention money held back, but now did not even get the remaining 60 per cent. of their certificates, soon became hopelessly in difficulties. Captain Banbury's interest was not paid ; the bank put in a receiver on their floating charge ; the real property became, at any rate for a time, seriously depreciated by the war ; and the prospects of Captain Banbury's recovering his interest and profits, or even his money lent, were very doubtful. Under these circumstances he commenced an action against the bank claiming damages against them for negligence in, through their manager Galletly, advising him as to the investment ; and secondarily for money had and received—(*a*) because he had given them money to invest in a second mortgage and they had not done so, a claim which was abandoned as he had obviously, after knowledge of the material facts, ratified the investment ; (*b*) because of a matter I refer to hereafter in connection with the Leiser mortgage. The defendants replied (1.) that Galletly had not advised the plaintiff and, if he had, had no authority to bind the bank ; (2.) that the bank and Galletly were under no duty to the plaintiff, who was not a customer of their Victoria branch, either to advise him at all or to advise him carefully as to investments ; (3.) that if they were under any such duty there was no negligence ; (4.) that the alleged advice consisted of representations as to the credit of the Westholme Lumber Company, which representations were not in writing and therefore could not be used to charge the defendants by reason of s. 6 of Lord Tenterden's Act. This contention was introduced by amendment at the trial before Darling J. on terms which I think were quite unjustifiably severe as to payment of costs.

The case was tried first before the Lord Chief Justice of England and a special jury. There were over 200 closely printed folio pages of commission evidence, besides oral evidence. The defendants

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submitted there was no evidence of duty or authority; the Lord Chief Justice left the matter to the jury in a very careful and exhaustive summing-up occupying seventy-two pages of the short-hand note. The jury considered the matter for four hours and then disagreed on the question of negligence. The case was set down for trial again, and came on before Darling J. and a special jury. It took three and a half days to try. The judge's summing-up, to which I shall have to refer again later, was less than a fourth of the length of that of the Lord Chief Justice, and the jury answered ten questions in twenty minutes. They found that Galletly had authority to bind the bank by advice, that he gave the advice alleged by the plaintiff, that it was given negligently and unskilfully, that the plaintiff relied on it, and that the damages were "25,000*l.*, all securities to be returned to the defendant bank." The judge had already decided that Lord Tenterden's Act did not apply to representations as to credit if used as evidence in an action for negligence. Judgment was accordingly entered for the plaintiff for 25,000*l.* and costs. The defendants appeal and ask for judgment on the grounds (1.) that the oral representations alleged could not be used to charge the defendants by reason of s. 6 of Lord Tenterden's Act; (2.) that there was no evidence of Galletly's authority to bind the bank by advice as to investments; (3.) that the bank owed no duty to the plaintiff and could not therefore be guilty of negligence; (4.) that if they owed any duty there was no evidence of negligence; and (5.) that if they were not entitled to judgment, at any rate they were entitled to a new trial on the ground that the verdict was against the weight of evidence; and especially that the judge misdirected and failed to direct the jury as to material matters, and that there was no proper or complete finding as to damages, the condition as to securities being one that the jury had no power to impose, and there being no finding as to the amount of damage if the plaintiff kept his securities.

I take the defendants' contentions in order. It was first contended that this action could not be brought because the plaintiff relied on negligent oral misrepresentations as to the credit and ability of the Westholme Lumber Company as evidence of the breach by the defendants' servants of their duty to be careful, and it was said that this was contrary to s. 6 of Lord Tenterden's Act of 1828. This

section reads: "That no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith"; and it has been held in *Swift* v. *Jewsbury* (1) that where the defendant is a company, as a banking company, the signature of an agent such as a branch manager will not suffice; there must be the seal of the company. On this section three points were taken by counsel for the plaintiff. They said (1.) the section only applies to fraudulent misrepresentations or to the action of deceit; (2.) the section only applies to actions brought on the misrepresentation itself, such as the action of deceit, and not to actions in which the misrepresentation is proved as evidence supporting another cause of action, such as an action for negligence; (3.) that at any rate the misrepresentations must be as to the credit and ability of a person—and here they were as to the value or nature of a mortgage security—or the probable nature of a contract.

The Act is always connected with the name of Lord Tenterden, and in *Tatton* v. *Wade* (2) in 1856 Pollock C.B. related Lord Tenterden's own statement as to his motive in framing the section thus: "Lord Tenterden told me that his motive for introducing that provision into the Bill, was, that he was struck with the remarkable fact, that, numerous as actions of the sort were,—actions for false misrepresentations as to the character and credit of third persons,—the plaintiff almost invariably succeeded; which induced him to think there was some latent injustice which required a remedy. That is the true history of that enactment." In 1836 in *Lyde* v. *Barnard* (3) the four Barons of the Exchequer were equally divided on whether a certain representation was within the Act, but all agreed as to the mischief intended to be remedied by the Act and the desirability of construing the Act so as to remedy that mischief. The Statute of Frauds had required guarantees or promises to answer for the debt, default, or miscarriage of another to be in writing.

(1) L. R. 9 Q. B. 301. (2) 18 C. B. 381.
(3) 1 M. & W. 101, 122.

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But in *Pasley* v. *Freeman* (1) in 1789, for apparently the first time, an action founded on fraudulent misrepresentation as to the credit of another without alleging any contractual duty or assumpsit, express or implied, had been allowed by the King's Bench. Once allowed, where the oral guarantee could not be sued on by reason of the Statute of Frauds, recourse was had to an action on an oral representation as to the credit of the debtor on the faith of which credit was given, and which was alleged to be false and fraudulent. And as Lord Abinger puts it in *Lyde* v. *Barnard* (2), the framer "seems to have done so with a view not to narrow, but to extend his remedy to all possible cases in which litigation, fraud, or perjury, might be prevented, by requiring a written document to attest a representation or assurance concerning or relating to the conduct, character, credit, or ability of another, by means of which representation and assurance the party making it intended that other person to obtain money, goods, or credit." And probably at the time of the Act the actions intended to be defeated by s. 6 were actions, such as *Pasley* v. *Freeman* (1), based on alleged fraud. But the words in which an Act is expressed may go beyond the evil originally aimed at, and on the first objection taken by the plaintiff, that the Act is limited to fraudulent misrepresentations, I can find no ground for limiting the words "any misrepresentations" to "fraudulent misrepresentations." Curiously enough in the case of *Clydesdale Bank* v. *Paton* (3), on the corresponding Scotch Act, it was argued that the fact that the misrepresentations were fraudulent took them out of the operation of the Act, and the House of Lords held that they were certainly within the Act, while Lord Davey, considering the English as well as the Scotch Acts, clearly assumed that innocent misrepresentations as well as fraudulent ones were within the Act. It is true that in *Swift* v. *Jewsbury* (4), in giving reasons for holding that the signature must be the signature of the principal and that the signature of his agent is insufficient, Lord Coleridge says: "The subject of s. 6 is the charging of a person for an act of fraud"; and Bramwell B. says: "The effect of the statute is this, that a man should not be liable for a fraudulent representation as to another person's means unless he

(1) 3 T. R. 51.
(2) 1 M. & W. 101, 122.
(3) [1896] A. C. 381.
(4) L. R. 9 Q. B. 301, 311, 316.

puts it down in writing." But these were reasons for the decision; the point whether the Act would apply to an action founded on an innocent misrepresentation treated as a warranty or collateral contract was not before the Court, or referred to in the argument or judgment. I can find nothing in the wording of the Act or the reasons for its enactment to exclude its application to such an action, or to limit it to cases of fraud. The plaintiff's first point therefore fails.

The second point has given me more difficulty. It is said that the section prevents an action being brought upon representations but does not prevent evidence of such misrepresentations being given in an action brought upon an alleged duty to be careful, in which misrepresentations are tendered as evidence of the breach of the duty to use care. Actions of deceit, and possibly actions based on an innocent misrepresentation treated as an oral collateral contract, it was said, may be "brought upon" misrepresentations, but an action for negligence is brought not upon misrepresentations but on a duty to use due care. It was said, on the other hand, that this construction gave no effect to the words "by reason of," which were an extension of the language of the Statute of Frauds and must have effect given to them.

Now the action of deceit is brought upon fraud coupled with resulting damage. Buller J. begins his judgment in *Pasley* v. *Freeman* (1): "The foundation of this action is fraud and deceit in the defendant and damage to the plaintiffs. . . . . Fraud without damage, or damage without fraud, gives no cause of action." When Lord Herschell in *Derry* v. *Peek* (2) states the principles of the law he begins: "First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false." The false representation is therefore treated as proof or evidence of the fraud; and an action is brought to charge the defendant "upon or by reason of the representation," when it is given in evidence to prove the fraud which will charge him. With this agrees the decision in *Haslock* v.

(1) 3 T. R. 51, 56. (2) (1889) 14 App. Cas. 337, 374.

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Fergusson. (1) There A. obtained goods from B. on oral representations as to A.'s character made by C. A. having obtained the goods used their proceeds to pay C., to whom she was indebted. B. brought an action against C. for money had and received. The evidence of the fraud on which such an action was alleged to be founded was the oral misrepresentation. It was objected that Lord Tenterden's Act prevented such evidence being given, and replied that the action was not upon the misrepresentation but for money had and received, which would lie, as would trover, for goods obtained by an oral misrepresentation. The Court held that as the evidence or "medium of proof" of the cause of action was an oral misrepresentation as to credit, it was barred by the statute; "it could not be received in evidence unless put into writing." It seems well within the intention of the statute; the admission of oral evidence of representations as to credit "gives rise to frauds and perjuries," therefore it should be excluded as a medium of proof. If this is so, all oral evidence as to representations as to the credit and ability of the lumber company should have been excluded, though it was tendered to prove a breach of the duty to use due care. Thirdly, it was said that the representations in this case were not, within the section, "representations or assurances given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person." And this no doubt may give rise to some difficulties. In *Lyde* v. *Barnard* (2) the Court was equally divided on the question whether a statement that the life interest of Lord E. Thynne in certain funds was only charged with three annuities when in fact it was also charged with a mortgage of 20,000*l.* was within the Act as a representation as to the "ability" of Lord E. Thynne. Parke B., who took the view that it was not within the section, put the distinction in this way: "I do not by any means intend to say, that a representation as to the condition or value of a particular part of a man's property, may not relate to or concern his 'character, credit, &c.,' within the meaning of these words: it would do so where the declared object of the inquirer should be to give credit to a third person upon his personal responsibility, and he is seeking information as to part of the means which constitute its value; but where the representation is made as to the

(1) 7 Ad. & E. 86. (2) 1 M. & W. 101.

state of part of the property of such third person, not as an element of trustworthiness, but with a view that the inquirer should obtain a right to the thing itself, I am of opinion that such a representation in no way relates to or concerns the character, conduct, credit, 'ability,' trade, or dealings of that third person, within the meaning of this Act." In *Swann* v. *Phillips* (1) the representation was "You may safely lend to A. on the security of his promissory note, for the title deeds of his estate are in my possession and nothing can be done without my knowledge." The four judges of the Court of King's Bench held that this was a representation as to credit, followed by a reason why it was made; that the representation was entire and not severable, and must all be excluded from evidence. It would seem that a representation "You may safely lend 1000*l.* to A. on the security of his land which is worth 1600*l.*," though you might extract from it a statement that the land was worth 1600*l.*, is really a statement as to the credit and ability of A., for the land is only material as supporting that representation.

The alleged representations as found by the jury in this case are as follows: (*a*) That the investment—i.e., the loan of 125,000 dollars to the Westholme Lumber Company—was perfectly safe. While this includes a reference to the value of the security, it seems to me clearly a representation as to the credit and ability of the company. I take the same view of (*d*), that with the loan the Westholme Lumber Company would be able easily to carry out their contract for the city of Victoria without further borrowing. This is both a reason why the investment is safe and a representation as to credit. Allegations (*b*) and (*c*) stand on a slightly different footing. Allegation (*b*) is that the mortgage would be a second mortgage ranking only behind the first mortgage held by the defendant bank. Now the plaintiff admitted that he knew a small mortgage to the Royal Trust Company would be in front of him as well as the bank's mortgage; and as to a small mortgage to one Leiser for the price of goods supplied to the contract, he knew of it when he got his mortgage; it was paid off out of his money, and his mortgage contained a covenant that the money advanced might be used for "expenses incurred in the construction of the water supply," which covered the sum for which the Leiser mortgage was given. The allegation

(1) 8 Ad. & E. 457.

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has therefore no legal relevance except as a reason why the investment was safe, and forms, as did the representation in *Swann* v. *Phillips* (1), in my view, an inseparable part of an entire representation as to credit and ability. Lastly, the jury found (c) an allegation that the money was required and would be used only for the purpose of completing the water contract for the city of Victoria. But it was true that it was required, and the mortgage allowed it to be used, for expenses incurred or to be incurred in completing that contract.

So far as the alleged advice or representations are material they seem to me to be a representation, with reasons, as to the credit and ability of the borrower which, being oral, cannot be given in evidence by reason of Lord Tenterden's Act. If this evidence is excluded it seems impossible to make a case of negligent advice, for the simple statement " I advise you to invest " appears to involve a statement that the loan or investment is desirable or safe, which must involve a representation as to the credit or ability of the borrower. As the evidence necessary to prove the cause of action was inadmissible, I am of opinion that judgment should be entered for the defendants on this ground.

The next point taken by the defendants was that there was no evidence of Galletly's authority to bind the bank. Counsel for the plaintiff admitted that it was not part of the normal duty of the managers of branches to advise about investments, and that they had no general instructions on the subject. But he said that, having regard to the association between the bank and this company and the negotiations which had taken place, the bank manager was acting in this instance within the scope of his authority. Darling J. summarizes his contention as being " In those particular circumstances, seeing what were the transactions between the defendant bank and the Westholme Lumber Company, seeing what was the correspondence between the manager at Vancouver, Mr. Sweeny, and Mr. Galletly, seeing what was the interest of the bank in getting financial assistance for the lumber company, there was authority given to Mr. Galletly to advise Mr. Banbury " ; or " upon all the letters that have been read to you and all the evidence that has been given, you may come to the conclusion that although

(1) 8 Ad. & E. 457.

there was no general authority in every branch manager to give such advice as Mr. Galletly is said to have given to Captain Banbury, yet in this particular case there was authority to give the advice." This is very general and vague. We start, however, with the admission that a branch manager had not ordinarily any general authority to advise as to investments, so that authority is not proved by proving the fact that Galletly was a branch manager. In what precise manner is it suggested he got authority from his principals? There is no express authority suggested, except perhaps the letter of July 6, 1911, but it is suggested that authority may be inferred, I think, in three ways: (1.) It is said, though not very confidently, that the letter of July 6, 1911, is an authority. I cannot read this letter, or think that any reasonable person can read it, with its statement that Captain Banbury is visiting this country "on pleasure," as an authority to bank managers who have not ordinarily such authority to bind the bank by business advice they give. (2.) It is said that the correspondence between Galletly and Sweeny and the head office is material from which such authority can be inferred. I have read the correspondence very carefully and can find nothing to give authority to advise so as to bind the bank. (3.) In argument before us counsel for the plaintiff put the authority on a ground of which there was no express evidence, namely, as I understand it, that any branch manager had an authority in the case where a customer had an overdraft with the bank, or a loan on security from the bank, to protect the bank's interest by getting money from elsewhere for the customer by, amongst other means, advising third parties financially to assist the customer, even though the bank incurred a liability for this advice. This, however, merely means an authority to protect the property of the bank, not to increase its liabilities to third parties or to become security for the customer. I cannot see any ground for this contention. In my opinion there was no evidence on which the jury could come to a conclusion that Galletly had authority from the bank to give financial advice on the basis of a legal duty to use due care and skill in advising, as will be seen hereafter, and the defendants are therefore entitled to judgment on this ground also. I think that, had there been such evidence, the jury received no proper or sufficient direction on a subject which

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requires careful explanation to the jury. "On all the correspondence and evidence had he authority?" without further explanation leaves the jury to answer in their minds some such question as "In all the circumstances is it fair that the bank should pay Captain Banbury what he has lost?" And the position of Captain Banbury, claiming 40 per cent. interest if the adventure succeeds and damages against the bank if the adventure fails, without paying the bank anything for its undertaking this liability, seems a very fortunate one.

Thirdly, it was said that the bank owed no duty to the plaintiff and therefore could not be negligent. It is clearly established that "negligent misrepresentation can give rise to a cause of action only if a duty lies upon the defendant not to be negligent": per Bowen L.J. in *Le Lievre* v. *Gould*. (1) "The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence": per Lord Esher in same case. (2) Thus in *Low* v. *Bouverie* (3) a trustee who answered inquiries from a stranger at the request of his cestui que trust as to incumbrances on the trust property, and, mentioning two incumbrances, honestly forgot to mention six prior incumbrances, was held not liable, for if he was honest he owed no duty to the stranger to be careful. In *Le Lievre* v. *Gould* (4) a surveyor who gave to a builder certificates as to the progress of the work which contained untrue statements made negligently but without fraud was held not liable to a person who advanced money on the faith of the certificates because, having no contract or other legal relations with the lender, he owed no duty to him to be careful. This question of "duty" in the relation of the bank and Captain Banbury is of course closely connected with the question of authority or the relation of the bank to its manager. What duty is suggested on the bank? It is admitted that when Captain Banbury came to the branch manager and asked to be introduced to an investment the manager was under no duty to answer him at all, but it is said that when he did advise or introduce an obligation arose to do it carefully or skilfully. Captain Banbury was not a customer of

(1) [1893] 1 Q. B. 501.
(2) Ibid. 497.
(3) [1891] 3 Ch. 82.
(4) [1893] 1 Q. B. 491.

the Victoria branch; the funds he had to invest were with the Royal Trust Company at Vancouver: he was paying the bank or the Victoria branch nothing for the service of obliging or advising him. He asked for advice and he got it; but what was the consideration, if any, for the implied undertaking to be careful? "If you will advise me as to an investment I will invest in what you advise"? If this was it, there was no such promise by or duty on Captain Banbury. There are cases of gratuitous deposit—*Giblin* v. *McMullen* (1)—or gratuitous services, such as a surgical operation, where an obligation to use due care may arise, but there the obligator is entrusted with property or permitted to interfere with the person, which, as was held in *Whitehead* v. *Greetham* (2), may be a sufficient consideration. In this case Captain Banbury entrusted the branch manager or the Victoria branch with nothing. Lending money to the lumber company is the result of the advice, not the consideration for the promise to give careful advice. "If you will advise me carefully to invest in the lumber company I promise to invest in it" seems to me an absurd contract. And I notice that until his solicitors in December, 1913, advised Captain Banbury he had a claim for negligence in respect of the advice in 1912 he had treated the matter as a friendly relation for which he was originally grateful. [The Lord Justice referred to the correspondence and continued:]

I have come to the opinion that there was no duty on the bank to use due care in advising Captain Banbury, and that therefore the question of negligence cannot arise, and on this ground also the defendants are entitled to judgment. But, if there is such a duty, the bank say there is no evidence of their negligence fit to be left to the jury. On this point the evidence stands in this way: No fraud is alleged against Galletly; he is treated as an honest man, though there are expressions in the summing-up which certainly suggest improper motives, or suppression of material facts. This honest man, just before Captain Banbury came to him, had a report from Mr. Cartwright, a Canadian engineer of high standing who had been asked to advise the bank on the prospects of carrying out the contract with profit. Mr. Cartwright had reported that at contract prices the contract work should make more than the profit

(1) (1868) L. R. 2 P. C. 317. (2) 2 Bing. 464.

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anticipated by the contractor, and it is not suggested that Cartwright was negligent in his report. How then can it be said that Galletly, who honestly relied on Cartwright's report, and indeed gave it to Captain Banbury, was negligent in reliance on Cartwright? What is said, however, is that Cartwright's report does not deal with finance, but reports in favour of the contractor "unless hampered by lack of funds," and "with sufficient funds." As to this, Banbury knew that the lumber company had without him not sufficient funds, and that the bank, who had lent them some money, would not lend them any more. Cartwright said in evidence he had calculated the capital required, and the sum advanced by Banbury was enough; and it was said that the real cause of the disaster was the refusal of the city to pay money due, and not the insufficiency of that money, if paid, together with Banbury's funds. The shortest way in which the case can be put for the plaintiff is that, knowing the unfavourable view his superiors took of the prospects of the contract before Cartwright's report, Galletly should have given Captain Banbury an opportunity of judging of this as well as of his own sanguine view by mentioning that others took a different view. I am inclined to think I myself should not have found negligence as contrasted with mistaken but honest belief; but on consideration I cannot say that a reasonable jury, properly directed, could not have found negligence, if there was any legal duty to be careful.

I am, however, clear that the jury were not properly directed in the matter: the direction on negligence is contained in one page of the summing-up; the distinction in giving opinions between negligence and honest error of judgment which does not depart sufficiently from the standard of reasonable care and skill to be considered negligence is not explained to them; the position and effect of Cartwright's report is not put before them, and the judge seems to have relied on the speeches of counsel as saving him the trouble of explaining to the jury the facts they had to consider. A judge may do this by consent of the parties, but without their consent he has no right to abdicate his functions in this way.

Of the four matters on which the defendants ask for judgment they succeed, in my opinion, on three, namely: (1.) that evidence of the alleged representation is barred by Lord Tenterden's Act; (2.) that there was no evidence of authority from the bank to

Galletly to advise as to investments; and (3.) that there was no duty on the bank to advise Captain Banbury carefully. I think they fail in obtaining judgment in the contention that there was no evidence of negligent advice.

The jury answered a question about Leiser's mortgage that the defendant bank acted negligently or in breach of their duty to the plaintiff in allowing a part of the plaintiff's money to be used in paying off the mortgage to Leiser & Co. I cannot see any duty in the bank to the plaintiff to supervise the expenditure of this money, or, if there was a duty, any negligence in allowing the money to be expended in the way in which the plaintiff's mortgage allowed it to be expended, in defraying expenses already incurred for the Sooke River contract; and these were the subject of the Leiser mortgage. This answer could therefore form no ground for judgment for the plaintiff. If it did, the summing-up on this point, which was very brief, was most unsatisfactory. The defendants' case was not put to the jury at all, nor were the terms of the plaintiff's mortgage referred to and their effect explained. What really had happened appears from the commission evidence, and this was never explained to the jury at all.

The summing-up on damages is equally unsatisfactory. The real question, as the plaintiff had ratified the investment, was "How much was he the worse off by the negligence?" Comparing his present position, secured as he was, how much had he lost? There was a great deal of detailed evidence as to the value of the securities, and whether they would leave anything for the plaintiff after the bank was satisfied. The judge does not refer to it at all, and says "I do not know that the damages are much in dispute" —a complete misapprehension of the position. The defendants handed up in the course of Sir John Simon's reply two tables comparing in detail the evidence given for the plaintiff and defendants on damages. No one was clear where those pages got to. If they were handed up to the judge, nothing more was heard of them; if to the jury, no reference was made to them. The question to be considered and the effect of the, it is to be hoped temporary, depreciation of the security by the war needed careful explanation to the jury and received no explanation at all. I have carefully read the evidence, and with a proper direction the jury might have

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found the figure they did, and the Court could not have interfered; but with no direction or explanation at all the Court could not have allowed this part of the findings to stand. The jury added a rider that the plaintiff should return all securities. The judge was not there when the verdict was given, a practice which is most unsatisfactory and has already once been commented on unfavourably in this Court; and therefore no attempt was made to find out whether the jury meant that the securities were really valueless after the bank's claim was exhausted, or had not troubled to value them in view of their rider that the bank should have them. On this part of the case a new trial must have been ordered had not we ordered judgment to be entered for the defendants.

The same remarks apply to the rest of the summing-up. The judge read the plaintiff's evidence-in-chief to the jury and did not read or summarize the defendants' case as presented in cross-examination or in the voluminous commission evidence called by the defendants. On the contrary he says: "Of all the documents, the letters and so on, and the evidence of other people, that is the only evidence either to confirm or rebut what the plaintiff has there said." This remark, if correctly reported, is either unintelligible or entirely misleading, and it is all the guidance the jury got on this point. The judge cannot leave the absence of a summing-up to be supplied by the conflicting speeches of counsel; and it is in my opinion most unsatisfactory that a heavy mercantile case should be presented to the jury in a summing-up such as this.

The necessity for a new trial, which otherwise could not be avoided, is, however, averted by the view I have taken that on three of their contentions the defendants are entitled to judgment, and judgment must accordingly be entered for them with costs here and such costs below as are not covered by the terms of the judge's order as to amendment.

Solicitors for appellants: *Bischoff, Coxe, Bompas & Bischoff.*
Solicitors for respondent: *William Sturges & Co.*

G. A. S.

HOLGATE *v.* BLEAZARD.

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Dec. 11.

Trespass—Adjoining Occupiers of Farms held from same Landlord—Agreements with Landlord to keep Fences on respective Farms in repair—Fence on one Farm out of repair—Horses from other Farm straying through Gap in Fence—Injury to Colt belonging to Occupier whose Fence is out of repair—Right to recover Damages from Owner of straying Horses.

The plaintiff and defendant occupied adjoining farms, which they rented from the same landlord, their tenancies having commenced on the same day. A fence upon the plaintiff's farm which, under his agreement of tenancy, he was liable, as between himself and the landlord, to keep and leave in good repair, and which divided the farms, became out of repair, with the result that two of the defendant's horses escaped from a field forming part of the farm occupied by him into a field forming part of the farm occupied by the plaintiff and injured a colt belonging to him. The defendant had entered into an agreement with the landlord, in terms similar to that of the plaintiff, to keep in repair the fences on his holding :—

Held, that the defendant was liable to the plaintiff in damages for the injuries caused to the plaintiff's colt, inasmuch as the general principle that owners of animals must keep them upon their land at their peril applied, and the mere fact that the plaintiff had committed a breach of the obligation he was under as between himself and the landlord to repair the fence was not enough to bring the case within the exception of damage caused by the plaintiff's own default recognized by the Court of Exchequer Chamber in *Fletcher* v. *Rylands* (1866) L. R. 1 Ex. 265 ; affirmed in the House of Lords (1868) L. R. 3 H. L. 330.

Appeal by the plaintiff Holgate from a judgment of the judge of the county court of Lancashire holden at Clitheroe.

The plaintiff and defendant were farmers occupying adjoining farms, which they rented from the same landlord, their tenancies having commenced on the same day. A fence upon the plaintiff's farm which, under his agreement of tenancy, the plaintiff was liable, as between himself and the landlord, to keep during, and leave at the end of, his tenancy in good order and tenantable repair, and which divided the farms, became out of repair, with the result that two of the defendant's horses got out of a field occupied by the defendant into a field of the plaintiff and injured a colt belonging to

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the plaintiff. The plaintiff brought an action in the county court to recover damages for the injuries to the colt. The county court judge gave judgment for the defendant, holding that, as the plaintiff by his agreement of tenancy was under an obligation to his landlord to keep the fences of his farm in repair, and the horses got into the plaintiff's field through a gap in the fence on the plaintiff's farm caused by his failure or neglect to maintain and keep it in repair in accordance with his agreement with the landlord, the plaintiff could not recover in the action. The defendant had entered into an agreement with the landlord, in terms similar to that of the plaintiff, to keep in repair the fences on his holding. The plaintiff appealed.

A. M. Langdon, K.C., and *F. Hinde*, for the plaintiff. Under his lease there was no obligation upon the plaintiff as between him and the defendant to repair the fence. Therefore the fact that the plaintiff had omitted to fulfil his covenant with his landlord does not disentitle him to recover damages from the defendant. The authorities show that at common law (1.) an occupier of land must keep his cattle upon his own land at his peril; he is liable if they escape and cause damage to an adjoining occupier; (2.) there is no obligation upon an occupier as between him and the adjoining occupier to fence his land; (3.) a covenant by an occupier with his landlord is as regards an adjoining owner res inter alios acta. It does not affect the obligations of the adjoining owners as between themselves.

As to any common law duty of an occupier to fence, the only duty is to fence if it is necessary to do so in order to carry out the obligation to prevent his cattle from straying on another's land: *Boyle* v. *Tamlyn*. (1) Whether he fences or not, if his cattle escape and do damage he is equally liable: *Hilton* v. *Ankesson* (2); *Fletcher* v. *Rylands*. (3) In order that an obligation to fence as between two adjoining occupiers may exist it must arise by agreement, prescription, or through one tenement being dominant and the other servient. Any question as to fences only arises incidentally: *Ellis* v. *Loftus Iron Co.* (4) *Ricketts* v. *East and West India Docks, &c. Ry. Co.* (5) shows

(1) (1827) 6 B. & C. 329.
(2) (1872) 27 L. T. 519.
(3) L. R. 1 Ex. 265; L. R. 3 H. L. 330.
(4) (1874) L. R. 10 C. P. 10.
(5) (1852) 12 C. B. 160.

that any duty to fence as between adjoining owners does not enure for the benefit of any one else. *Singleton* v. *Williamson* (1) is distinguishable. In that case there was a statutory obligation upon the defendant to fence. Under the statute the duty was absolute, and therefore any person injured by a breach of it had a right of action against the person in default. [Bullen and Leake on Pleading, 3rd ed. (1868), p. 329, was also referred to.]

H. P. Glover, for the defendant. The obligation upon an occupier to keep his cattle from trespassing on his neighbour's land is not unqualified, and it does not exist if there is an obligation upon the adjoining tenant to keep his fences in repair: *Wiseman* v. *Booker* (2); *Rooth* v. *Wilson*. (3) The principle at common law was that if an occupier of land was under no liability to keep the fences on his land in repair his neighbour was bound to keep his cattle off the land of the adjoining occupier. The obligation to repair a fence only arises where there is no obligation on any other person to repair it. If there is the obligation on another person, whether by statute, prescription, an inclosure Act, or by contract, that person cannot bring an action against a neighbour for damages which are consequent upon his own default. In the present case the obligation never sprang into existence as against the defendant, even though the obligation upon the plaintiff under his agreement of tenancy was as between himself and the landlord: *Coaker* v. *Willcocks*. (4) The defendant is entitled to take advantage of the finding of the county court judge that his horses would not have strayed had it not been for the plaintiff's breach of his obligation to repair the fence. An obligation upon the plaintiff to repair the fence and an obligation upon the defendant to repair the same fence cannot co-exist.

The tenancies having commenced at the same time and with similar covenants, each tenant is entitled to the benefit of the covenants entered into by the other. The covenants being in identical terms, each tenant covenants to keep sufficient fences to protect his own land from cattle belonging to his neighbour.

Langdon, K.C., in reply. The action is founded on trespass. The

(1) (1861) 7 H. & N. 410.
(2) (1878) 3 C. P. D. 184.
(3) (1817) 1 B. & Al. 59.
(4) [1911] 1 K. B. 649.

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trespass by the defendant remains unless the plaintiff has committed some breach of duty which makes it cease being a trespass. That could only happen if there was the breach of some duty owed by the plaintiff to the defendant.

RIDLEY J. In this case a question of some intricacy arises for our decision. [The learned judge having stated the facts continued:] In my judgment the rule is correctly stated not only in *Fletcher* v. *Rylands* (1), but also in Bullen and Leake on Pleading, 3rd ed., p. 329, where it is laid down that "The general rule of law is that the owner of cattle is bound to take care that they do not trespass on the land of others." In other words, that it is his duty as a general rule of law to keep his fences in such a condition as will prevent them from trespassing. The passage continues: "But the owner of the land"—that is, the other owner upon whose land the trespass is committed—"may be bound by prescription or otherwise to maintain and repair a fence for the benefit of the owner of the adjoining land who may have a corresponding right to have the fence so maintained and repaired." In other words, the owner of cattle, who is bound to take care that they do not trespass, may escape his liability by showing that the liability to maintain the fence is upon another person. I agree, but the question is, does that proposition include the case where the adjoining tenant has merely covenanted with his landlord that he will repair it? With great respect to the learned county court judge it seems to me that it does not. *Singleton* v. *Williamson* (2) was a case where the law had imposed upon the defendant the obligation of maintaining the fence. That obligation was imposed upon the defendant by an Act of Parliament for inclosing land in the parish of Gosforth. As the obligation to maintain the fence had been placed upon the defendant by the Inclosure Commissioners, it was impossible, the Court held, that the liability should be put upon the plaintiff for damage to the defendant arising through cattle escaping through a fence on the other side of the river and so on to the defendant's land. *Ricketts* v. *East and West India Docks, &c. Ry. Co.* (3) is a similar case. There is also *Rooth* v. *Wilson* (4), an

(1) L. R. 1 Ex. 265.
(2) 7 H. & N. 410.
(3) 12 C. B. 160.
(4) 1 B. & Al. 59.

earlier case, where the same rule was laid down; that is to say, it being established that there was a duty to maintain a particular fence by C., B., the adjoining owner, although a gratuitous bailee of A.'s horse, might maintain an action against C. for the value of the horse which was killed by falling from B.'s into C.'s field. As it was C.'s duty by law to maintain the fence, B. had the right to recover against him for not keeping it in repair, not merely in respect of an injury to his own horse, but also in respect of a horse sent to B. to be kept there for the night. In my view the exception to the rule laid down in *Fletcher* v. *Rylands* (1), where the word "default" was used, cannot be extended to a case where from the juxtaposition of two properties there is an obligation which rests upon a person who brings cattle into his field to take care of them, but the adjoining tenant has covenanted with the landlord to keep the fence through which the cattle stray in repair. The tenant having the obligation to keep his cattle safe cannot say to the adjoining tenant "It is not my fault. You ought to have mended the fence because you covenanted to do so with your landlord." The answer to that suggestion would be "The fact that I am under a duty to my landlord does not give you the right to bring horses and cattle on to your field and to allow them to go on to your neighbour's land." The obligation upon the plaintiff in the present case is a secondary one and is an obligation as between himself and the landlord, but there is an obligation upon the defendant if he brings cattle upon his land to keep them from straying, and he cannot take advantage of the plaintiff's breach of contract with the landlord by claiming a right to let his cattle escape through the gaps in the fence and trespass on the plaintiff's land. Applying that principle to the present case, in my judgment the covenant between the plaintiff and the landlord does not relieve the defendant from the consequences which as a general rule follow where a person's cattle escape from his field through a gap in a fence and trespass on to his neighbours' property.

I am of opinion that the judgment of the learned county court judge ought to be reversed and judgment entered for

(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

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the plaintiff for the amount of the damage caused by the horses.

AVORY J. I entertained some doubt during the arguments whether the facts in the present case might not bring it within the exception contemplated by Blackburn J. in delivering the judgment of the Court in *Fletcher* v. *Rylands* (1) when he said: "The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property." It is clear from that language that he contemplated as an exception to the general rule the case where the plaintiff has been damnified by the trespass but by his own fault. I think there is a good deal to be said in support of the argument which was very ably addressed to us by Mr. Glover on the defendant's behalf, that on the finding of fact in the present case it has been brought within that exception to the general rule, namely, that it was by the plaintiff's own fault that the horses escaped on to his land. But it is necessary to look a little more closely into the meaning of the words "fault"—or "default" as it is sometimes expressed—on the part of the plaintiff. The general principle with regard to cattle, as stated by Blackburn J., is that the owner must keep them in at his peril; he will be answerable for the damage which is the natural consequence of their escaping. I think it instructive to consider another authority which he cites in support of that principle where he says "As early as the Year-book 20 Edw. 4, 11, placitum 10, Brian C.J. lays down the doctrine in terms very much resembling those used by Lord Holt in *Tenant* v. *Goldwin* (2), which will be referred to afterwards. It was trespass with cattle. Plea, that the

(1) L. R. 1 Ex. 265, 280, 281. (2) (1705) 2 Ld. Raym. 1089.

defendant's land adjoined a place where defendant had common, that the cattle strayed from the common, and defendant drove them back as soon as he could. It was held a bad plea. Brian C.J. says 'It behoves him to use his common so that he shall do no hurt to another man, and if the land in which he has common be not enclosed, it behoves him to keep the beasts in the common and out of the land of any other.' He adds, when it was proposed to amend by pleading that they were driven out of the common by dogs, that although that might give a right of action against the master of the dogs, it was no defence to the action of trespass by the person on whose land the cattle went. In the recent case of *Cox* v. *Burbidge* (1) Williams J. says: 'I apprehend the general rule of law to be perfectly plain. If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour, and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial.'" That seems to show that the liability is the same even if the cattle be on a common or upon a place where there is no fence; the liability of the owner to prevent them from straying is the same.

In these circumstances I have come to the conclusion that the mere fact that the plaintiff in the present case was under a covenant to keep in repair the fence is not sufficient to bring the defendant within the exception contemplated in *Fletcher* v. *Rylands* (2) of the escape being due to the "default" of the plaintiff, and that there is a clear distinction between cases where there is a statutory obligation or an obligation by deed to maintain a fence which will be sufficient to exclude cattle or prevent them from trespassing and the present one, where the only obligation on the part of the plaintiff, upon which in fact the county court judge based his judgment, is the obligation as between him and his landlord to keep in repair the existing fence.

I have come to the conclusion that the learned county court judge was not justified, on the mere breach of the covenant to repair, in holding that the case was taken out of the admittedly general

(1) (1863) 13 C. B. (N.S.) 430, 438.

(2) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

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principle, namely, that the owner of cattle is bound at his peril to keep them in and to prevent them from trespassing. I therefore agree that the judgment should be reversed.

Appeal allowed.

Solicitor for plaintiff: *R. H. Bentley, for J. J. Briggs, Padiham.*
Solicitors for defendant: *Rawle, Johnstone & Co., for J. H. Ramsbottom, Clitheroe.*

J. E. A.

C. A.

1916

Dec. 12.

[IN THE COURT OF APPEAL.]

HEATHCOTE *v.* HAUNCHWOOD COLLIERIES, LIMITED.

Employer and Workman—Partial Incapacity from Accident—Compensation—Weekly Payments—Principle of Assessment—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., clause* 3.

In ascertaining under Sched. I., clause 3, of the Workmen's Compensation Act, 1906, the amount of compensation payable to a workman who has been partially incapacitated by accident arising out of and in the course of his employment, the two factors to be considered are, first, the average weekly amount of the wages before the accident, and next the average weekly amount which the workman is earning or is able to earn in some suitable employment after the accident, and the weekly payment is not to exceed the difference between the two. Where a workman after the accident had found fresh employment at which he was earning less than his wages before the accident, and it was found by the arbitrator that if he worked in another branch of his old employment he could earn more than the average weekly amount of his wages before the accident:—

Held by Lord Cozens-Hardy M.R. and Scrutton L.J. (Warrington L.J. dissenting), that he was not entitled to any compensation

APPEAL from an award of the judge of the Nuneaton County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant, William Heathcote, was injured on September 2, 1915, by an accident arising out of and in the course of his employment as a coal-getter by the respondents, the Haunchwood Collieries, Limited, resulting in the loss of his left eye. He received compensation at the rate of 17*s.* 6*d.* per week, being half his average weekly

earnings prior to the accident, from the date of the accident to December 13, 1915. He then resumed work at 20*s.* 5*d.* a week, but on February 1 he was discharged by the respondents owing to a letter which his wife had written to them. On February 5 he entered the service of the Nuneaton Corporation as a horse driver at a wage of 30*s.* per week, and commenced these proceedings for compensation under the Act.

The respondents by their answer denied their liability to pay compensation on the ground that the applicant was no longer incapacitated by reason of the injury from earning the same wages as before the accident.

The county court judge found that but for the accident the applicant could have worked at the coal face and earned 8*s.* 6*d.* a day, and that he could now earn as a packer or loader 7*s.* 5*d.* a day. Taking into consideration all the circumstances, including the amount which the applicant would now be likely to earn if there had been no accident, he awarded the workman 5*s.* a week.

The respondents appealed on the grounds (1.) that there was no evidence upon which the county court judge could properly find that the applicant was entitled to compensation at the rate of 5*s.* or at any rate per week; (2.) that in fact the applicant had been able to earn more after than before the accident; (3.) that the learned county court judge misdirected himself by taking into consideration the amount which the applicant would now be likely to earn if there had been no accident.

A. Neilson, for the appellants. In this case the county court judge had no jurisdiction to award any compensation at all. The workman is capable of earning more than he was getting before the accident. The judge has found that he is capable of earning 7*s.* 5*d.* a day as a loader or packer. I rely upon the definition of principle laid down by Fletcher Moulton L.J. in *Bevan* v. *Energlyn Colliery Co.* (1) In the same case Farwell L.J. said (2): "The idea is as far as possible to compensate the man so as to put him in very much the same position . . . . in which he was before." Here there is no room for compensation at all.

(1) [1912] 1 K. B. 63, 70. (2) Ibid. 72.

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Joy, for the respondent. Farwell L.J. in *Bevan* v. *Energlyn Colliery Co.* (1) said that the arbitrator has to ascertain the average weekly amount which the workman is earning or is able to earn in some suitable employment or business after the accident. "That may be actual fact, if he is earning, or, if he is not earning, estimate of what he is able to earn." Where the workman is actually earning, unless there is a finding that he is acting unreasonably in taking the employment, his actual earnings are the criterion, and the hypothetical earnings need not be considered. If he has acted reasonably in accepting the employment the wages which he earns at it are the measure of his actual earning capacity. Although the county court judge has found that he could earn more at other work there is no evidence that he can in fact obtain employment in that kind of work: *Ball* v. *Hunt & Sons.* (2) Ability plus opportunity is necessary. There is here no evidence of opportunity, as distinct from ability, to get work as a packer or loader. The award was justified.

Neilson in reply. Farwell L.J. in *Bevan* v. *Energlyn Colliery Co.* (1) said: "The object of the Act is to give compensation for loss of earning capacity." Here the county court judge has found that the man's wage-earning capacity is not diminished. That is a finding of fact that he has lost nothing, and, therefore, he is not entitled to compensation.

LORD COZENS-HARDY M.R. This appeal comes before us in rather peculiar circumstances. It is a case of partial incapacity, and in ascertaining what the workman is entitled to the following rule is prescribed by clause 3 of the First Schedule to the Workmen's Compensation Act of 1906; "In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity,"—that is not in point—"and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the

(1) [1912] 1 K. B. 63, 72. (2) [1912] A. C. 496.

amount of that difference as under the circumstances of the case may appear proper." Now at first sight that seems a very simple case. What was the man earning before the accident? You can ascertain that, because that is constant. What is the other thing you have to look at in order to arrive at the difference which is specified here? That is the average weekly amount he is earning, or is able to earn, not in any business whatsoever, but in some suitable employment after the accident. The learned county court judge has done this. He finds, as to which there is no doubt, what the man was earning before the accident. Then he finds that working in his old employment as a collier, though not precisely in the same branch of the colliery work, namely, as a packer or loader, he can now earn 7*s.* 5*d.* a day. Reading from the judge's note he says: "Taking into consideration all the circumstances, including the amount which the applicant would now be likely to earn if there had now been no accident." Now that last sentence, I think, cannot be right. Counsel for the respondent really does not attempt to support that particular clause of the judgment, but it is said this is the best way of putting his point of view: the man is now earning from the Nuneaton Corporation a certain sum, 30*s.* a week, and that sum is less than what the learned county court judge finds he is capable of earning at a suitable employment. One reading of this clause is this: First, is the man earning anything? If he is earning anything, you need not go any further; it is only if he is not earning anything that you must then consider what he is able to earn. I do not think that is the meaning of the clause. I think it means this: Given a suitable employment, an employment in his own occupation at a colliery, if you find that although he is not earning that amount now he is able to earn more than the amount of his wages before the accident, that is what you must take as the other measure, and, that being so, in this case there is no room for compensation at all. If we are to take the Nuneaton wages, then there would be a small amount, though not the full amount which he has been awarded. On the whole I think the two factors are, first, the constant, the wages before the accident, and next the wages which as a matter of fact the learned judge finds he is able to earn at the present day. That being so, there is no limit to be exceeded, and in fact not one penny can be awarded to this unfortunate man.

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For these reasons, speaking for myself, I think the appeal succeeds.

WARRINGTON L.J. I regret to say that I take a different view of the true construction of clause 3 of the schedule from that expressed by the Master of the Rolls. I need not say that I express my views with great diffidence after having heard what he has said about it.

Now before I read the schedule I will state what the facts are. Before the accident the man in question was working at the coal face, and he was then earning 35*s.* a week. The accident resulted in the loss of an eye. The man has found work as a horse driver with the corporation of Nuneaton, and he earns at that work 30*s.* a week. There is no suggestion that the man acted unreasonably in accepting the employment with the corporation, nor was there any suggestion that he had made no effort to obtain other suitable work, except that he was asked whether he had applied at another colliery for work, and he said that he had not. Under those circumstances the learned judge has, I think, quite plainly thought this. He has ascertained the amount which the man was earning before the accident at 35*s.*, the amount which he is now earning at 30*s.*, and has awarded him the difference between those two. The last sentence of his award, which has been so much criticized, seems to me to be merely this: It is intended to justify him in holding that the relation which the weekly sum is to bear to the difference between the wages he was earning and the wages he is now earning ought to be that of 2 to 2, or 5 to 5—that is to say, equality; he has given the whole of that difference, and among the circumstances which he has taken into account is the amount which he could earn now if he were working at the coal face and the amount which he could earn now as a loader and packer. I think that is the explanation of the last sentence. What the learned judge has done is this: he has awarded to the man the difference between what he was earning and what he is now earning, and the whole of that difference. The clause in the schedule is clause 3 of the First Schedule to the Act; that is what we have to construe. [The Lord Justice read the material part of the clause and continued:]

Now here we have a case in which a man is earning a weekly

amount, and there is no suggestion that he has acted unreasonably in accepting that weekly amount as being fairly representative of that which he could earn. I agree with Farwell L.J. in what he said in *Bevan* v. *Energlyn Colliery Co.* (1); the remark to which I am referring is on p. 72: "Then he has to ascertain another matter, which may be called Y; he has to ascertain 'the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident.' That may be actual fact, if he is earning, or, if he is not earning, estimate of what he is able to earn." It seems to me, where he is earning that which is not shown to be an unreasonable amount, it is unnecessary and undesirable to embark on speculation as to what he might earn in some other suitable employment. In my opinion the learned county court judge was right in adopting the two alternatives for the purpose of ascertaining what was the difference between them and then in awarding the whole difference; he was entitled to regard all the circumstances of the case, including in particular the two circumstances to which he specifically refers, namely, the amount which he would be earning now if the accident had not happened at his old employment, and the wages which he could earn as a loader and packer. For these reasons I think, though my view, of course, will not prevail, that the award of the county court judge is right, and the appeal ought to be dismissed.

Scrutton L.J. My brother Warrington feels hesitation in differing from the Master of the Rolls even on the construction of the Workmen's Compensation Act. It is unnecessary to say that I feel the greatest hesitation when I am called upon to decide practically on the difference of opinion between my two brothers, who are both very familiar with the working of the Act, whereas I have only just launched upon that troubled sea. The Workmen's Compensation Act, as I understand it, directs the employer to pay to a workman who is injured in his employment certain conventional compensation, which may or may not amount to his real loss, and it says that that conventional compensation shall not exceed three *maxima:* it is not to exceed half the average annual wages for the year before (Rule 1 (*b*)); it is not to exceed 1*l.* (Rule 1 (*b*)); and it is not to

(1) [1912] 1 K. B. 63, 72.

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exceed (Rule 3) the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment. But if it does not exceed those *maxima* it may vary with the circumstances of the case, including the fact that wages have fallen or risen in the district since the accident. As I understand the view that my brother Warrington takes of that section, it is that when once you find a man is earning you need not inquire what he is able to earn, and he founds that, as I understand, or supports it, at any rate, by a sentence in the judgment of Farwell L.J. in *Bevan* v. *Energlyn Colliery Co.* (1): "That may be actual fact, if he is earning, or, if he is not earning, estimate of what he is able to earn." In that particular case the question being discussed was:—Can you take into consideration the fact that wages have dropped generally in the district since the accident, in order to see what loss the workman has sustained? And in the passage which is referred to Farwell L.J. is saying that under the original Act you could not look at circumstances such as a general fall or rise of wages since the accident; you had to find what the man was earning or could earn; it was either fact or estimate. I do not find in that any warrant for saying the one excludes the other and that you are not to look at both. I am not able, therefore, to read paragraph 3 of the schedule as if it provided that in case of partial incapacity the weekly payment shall not exceed the difference between the average weekly earnings of the workman before the accident and the amount which he is earning now, or if you cannot find out what he is earning, and then only, what he is able to earn. It is well known there are many cases where people do not earn what they might earn, through a false sense of dignity. People imagine that the profession that they have been carrying out is such that it would be undignified for them to keep themselves and their families by another profession or another occupation. In my view, this clause is inserted in order that a man who desires to live upon his dignity in this way shall do it at his own expense, and not at the expense of his employer. Of course one will be slow to indulge in speculation as to all the things that a man may do. In this par-

(1) [1912] 1 K. B. 72.

ticular case I have not much hesitation in speculating, because the man has gone out of his own trade into another. He was a collier; he has left the colliery trade and has become a driver of carts for the corporation. If that is the construction of the Act, the compensation is not to exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount he is earning or is able to earn in some suitable employment. The facts are these: The amount of the average weekly earnings of the workman before the accident was 35*s*., and the average weekly amount which he is earning is 30*s*. The county court judge finds that loading or packing was a suitable employment, and that he can now earn 7*s*. 5*d*. a day. Whether you take that at six days a week or five days a week, it amounts to more than 35*s*., and consequently the amount that you give the workman as conventional compensation cannot exceed nought, which is the difference between the amount of the average weekly earnings and the average weekly amount which he is able to earn after the accident. I am not sure that I understand the exact process by which the learned county court judge proceeded. It looks as if he thought he was at liberty to take into consideration, to increase the maximum, the average weekly earnings which, in view of the rise of wages, the workman might have made if there had been no accident: if so, he is wrong; and if the construction which I agree with the Master of the Rolls is the correct one to put upon paragraph 3 stands, the award appears to be wrong and must be set aside.

Solicitors for appellants: *Wood, Nash & Co., for Clay, Atkins & Co., Nuneaton.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for Hughes & Masser, Coventry.*

G. A. S.

C. A.
1916
Nov. 9, 10.
Dec. 15.

[IN THE COURT OF APPEAL.]

MOORE AND ANOTHER *v.* EVANS.

[1915 M. 455.]

Insurance—Policy on Jewellery—"Loss of damage or misfortune to" the Goods—Jewellery consigned Abroad on Sale or Return—Outbreak of War with Country of Consignee—Inability of Consignee to deal with Goods—Loss under Policy.

The plaintiffs, who carried on business in London as dealers in jewellery, insured their stock of jewellery by a non-marine policy for a year between January 8, 1914, and January 7, 1915, against "loss of damage or misfortune to the before-mentioned property or any part thereof arising from any cause whatsoever" whilst the goods were in the United Kingdom or any country in Europe (with certain exceptions) and in transit from any port in the United Kingdom or Europe to any other port in the United Kingdom or Europe.

Between June 16 and July 22, 1914, the plaintiffs consigned certain pearls so insured to trade customers in Frankfort-on-Main and Brussels on sale or return on the terms that the pearls remained the property of the plaintiffs until invoiced by them. In the ordinary course of business jewellery so sent on approval remains with the consignee for a limited period to give him an opportunity of selling it. By reason of the outbreak of war between Great Britain and Germany on August 4 and the occupation of Brussels by the Germans on August 20, 1914, it became impossible for the plaintiffs to recover possession of the pearls. There was no evidence that the pearls had been seized or specifically interfered with by the German authorities. As to the pearls sent to Frankfort there was no evidence that they had not remained in the possession of the consignees; and as to the pearls sent to Brussels the consignees had, with the subsequent assent of the plaintiffs, placed them in a bank there for safe custody, and there was no evidence that they had not remained in the bank:—

Held, that the policy was on goods and not on an adventure, and that the evidence did not establish a loss under the policy.

Judgment of Rowlatt J. [1916] 1 K. B. 479 reversed.

APPEAL from the judgment of Rowlatt J. at the trial of the action without a jury; reported [1916] 1 K. B. 479.

The plaintiffs, Messrs. Moore & Gallop, who carried on business in London as dealers in jewellery and precious stones, insured their stock of jewellery by a non-marine Lloyd's policy, which was underwritten by the defendant. By the policy the underwriters

agreed to make good to the plaintiffs during the period from January 8, 1914, to January 7, 1915, both inclusive, "all such losses damage or misfortune not exceeding the sum of 45,000*l.* in all as they may from time to time sustain by or from any of the causes or defects hereinafter mentioned during the said period within thirty days after such loss damage or misfortune is proved, and that in proportion to the several sums by each of us subscribed against our respective names. The property hereinbefore mentioned is jewellery, gold or silver ornaments or plate, pearls and precious stones of any sort or kind whatsoever, bank notes or scrip, whether the same be the property of the said Moore & Gallop or entrusted to them on sale or return or on approbation or for work to be done thereon, or for safe custody, or for any other purpose whatsoever, while the same are (save as hereinafter provided) in or upon any premises or place whatsoever or being carried or in transit by land or water in the United Kingdom or any country in Europe and also whilst being carried or in transit by sea from any port or place in the United Kingdom or Europe to any other port or place in the United Kingdom or Europe, provided always that this policy shall not apply to any property whilst the same is in Spain or the Empire of Russia. Touching the adventures and perils to the property hereby insured which we the assurers are contented to bear and do take upon us they are the loss of damage or misfortune to the before-mentioned property or any part thereof arising from any cause what soever whether arising on land or water save and except loss by theft or dishonesty committed by any servant or traveller or messenger in the exclusive employment of the assured unless when conveying goods to the post, and save and except loss by theft or dishonesty committed by any broker or customer in respect of goods entrusted to them by the assured their servants or agents, unless such loss arises when goods are deposited for safe custody by the assured their servants or agents with such broker or customer . . . ."

Between June 16 and July 22, 1914, the plaintiffs in the ordinary course of business sent certain pearls, so insured, to the value of 8747*l.* to some of their regular trade customers at Frankfort-on-Main and Brussels on sale or return. The advice note on each occasion contained this statement: "On sale for cash only or return. Goods had on sale or return remain the property of Moore

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& Gallop until invoiced by them. These goods must not leave your hands without our permission."

The ordinary course of business in the jewellery trade, as stated in the judgment of Swinfen Eady L.J., is that such goods so sent on approval remain with the consignee for two or three weeks to give him an opportunity of selling them; that after that interval the consignor would communicate with the consignee; and that by arrangement between the parties the period during which goods on approval are left with the consignee may be prolonged for several months, but that a period of six months would be unusual. On July 31, 1914, the plaintiffs wrote to their customer at Frankfort inquiring whether, in view of the political situation, he had made provision for the safe custody of the pearls, and asking him, if he thought it perfectly safe to send by registered post, to return the pearls if he had finished with them. No reply was received. On August 4 the plaintiffs sent the following telegram to their customer in Brussels: "Telegraph what done with our goods"; and on August 5 the customer telegraphed in reply: "Impossible send goods postal communication no longer assured since several days have placed in safety in bank. If you accept responsibility for returning will send to you." To which the plaintiffs replied on the same day: "Leave goods in safety in bank."

War broke out between Great Britain and Germany on August 4, 1914, and on August 20 Brussels was occupied by the Germans. By reason of the state of war it had become impossible for the plaintiffs to recover possession of the pearls. There was no evidence that the pearls had been seized or specifically interfered with by the German authorities. There was no evidence that the pearls which had been sent to Brussels had not remained in the bank there, nor was there any evidence that the jewellery sent to Frankfort had not remained in the possession of the consignees. On February 16, 1915, the plaintiffs brought this action on the policy, claiming as for a total loss.

Rowlatt J. held that there had been a total loss of the goods and gave judgment for the plaintiffs. The defendant appealed.

Roche, K.C., and *Patrick Hastings* (*Gordon Hewart, K.C.*, with them), for the defendant. There is no evidence that there was a "loss" of the pearls during the currency of the policy. The

evidence is that the pearls at Brussels are in safe custody in a bank, where they were placed with the subsequent assent of the plaintiffs, and there is no evidence that the pearls at Frankfort are not still in the possession of the customers to whom they were consigned. As Rowlatt J. rightly held, this is not a policy insuring the transit of the goods; it is a non-marine policy on the goods themselves. The doctrine of the destruction of a contemplated adventure does not apply in such a case. The learned judge, however, was wrong in holding that in the circumstances there was a loss of the goods. Pearls are not like perishable goods, and there is no loss though the plaintiffs may be prevented from regaining possession of them for, it may be, some years. There is no evidence that the pearls have been requisitioned or in any way appropriated by the German authorities. There may have been a loss to the plaintiffs' business owing to the impossibility of getting the pearls back from Frankfort and Brussels during the war, but there has been no "loss" of the pearls within the meaning of the policy: *Mitsui* v. *Mumford* (1); *Campbell & Phillipps, Ld.* v. *Denman.* (2) Nor has there been any "misfortune" to the pearls. It is difficult to see what meaning the word can have in the case of an inanimate thing. The same word occurs in the form of Lloyd's marine policy given in the First Schedule to the Marine Insurance Act, 1906 (6 Edw. 7, c. 41). [*Polurrian Steamship Co.* v. *Young* (3) was also referred to.]

Leslie Scott, K.C., and *D. M. Hogg* (*C. Gallop* with them), for the plaintiffs. There was a total "loss" of the pearls during the currency of the policy. The insurance is against all kinds of losses. Therefore a loss caused by war is included. The plaintiffs have been deprived by the operation of war of the actual possession of the pearls for an indefinite time, and that constitutes an actual loss of the pearls within the meaning of the policy. Where a ship is captured by the enemy the loss is total: *Goss* v. *Withers* (4); *Hamilton* v. *Mendes* (5); *Andersen* v. *Marten.* (6) Complete deprivation of possession for an indefinite time amounts to a total loss: *Stringer* v. *English and Scottish Marine Insurance Co.* (7);

(1) [1915] 2 K. B. 27.
(2) (1915) 21 Com. Cas. 357.
(3) (1913) 19 Com. Cas. 143, 159, per Pickford J. The case on appeal is reported in [1915] 1 K. B. 922.
(4) (1758) 2 Burr. 683, 694.
(5) (1761) 2 Burr. 1198, 1209.
(6) [1908] A. C. 334.
(7) (1869) L. R. 4 Q. B. 676, 687.

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Polurrian Steamship Co. v. *Young* (1); and the duration of war is quite indefinite: *Geipel* v. *Smith.* (2) "Lost" is defined in the Oxford English Dictionary as "to be lost to"; "to have passed from the possession of." See also Webster's and the Imperial Dictionaries. As soon as war was declared, in the case of the pearls at Frankfort, and as soon as Brussels was occupied, in the case of the pearls there, the plaintiffs were deprived of their possession and still remain so deprived, and they can sue for a total loss. See *Mellish* v. *Andrews.* (3) "Capture by an enemy or a pirate, or an arrest of princes . . . . is prima facie a total loss": Marshall on Insurance, 3rd ed., vol. 2, p. 568; see also pp. 512, 565. "The loss is, in its nature, total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle": *Roux* v. *Salvador.* (4) It is not contended that the doctrine of constructive total loss, applicable to marine policies, is applicable to such a policy as this, but where the facts are such as that in a marine policy they would justify abandonment, the assured in other cases may claim as for a total loss: *Mitsui* v. *Mumford.* (5) The actual decision in that case is distinguishable on the facts. There the plaintiffs' agent at Antwerp had two men looking after the timber, which was in a warehouse at Antwerp in the custody and under the control of the plaintiffs' agent in the same manner as it was before the war. The decision in that case, even if right, went on entirely different facts. [*Rankin* v. *Potter* (6), *Kaltenbach* v. *Mackenzie* (7), and *Shepherd* v. *Henderson* (8) were also referred to.]

Next, with regard to the word "misfortune," it has a meaning in a policy such as this. The plaintiffs have sustained a "misfortune" by reason of their being deprived of their pearls for an indefinite time, and the amount is capable of being assessed.

Patrick Hastings, in reply, referred to *Rodocanachi* v. *Elliott.* (9)

Cur. adv. vult. (10)

(1) [1915] 1 K. B. 922, 935.
(2) (1872) L. R. 7 Q. B. 404, 414.
(3) (1812) 15 East, 13.
(4) (1836) 3 Bing. N. C. 266, 279.
(5) [1915] 2 K. B. 31, 32.
(6) (1873) L. R. 6 H. L. 83, 128.
(7) (1878) 3 C. P. D. 467, 471.
(8) (1881) 7 App. Cas. 49, 69, 70.
(9) (1873) L. R. 8 C. P. 649; (1874) L. R. 9 C. P. 518.
(10) The case was placed in the paper on December 13 for the pur-

Dec. 15. SWINFEN EADY L.J. read the following judgment :— This is the judgment of Lawrence J. and myself.

The claim of the plaintiffs in this action is upon a non-marine Lloyd's policy on goods. The plaintiffs obtained judgment at the trial before Rowlatt J., and the defendant appeals and contends that the plaintiffs have failed to prove that there has been any loss under the policy for which the insurers are liable.

The plaintiffs carry on business in London as dealers in jewellery and precious stones. On January 8, 1914, they effected a Lloyd's policy for the period between January 8, 1914, and January 7, 1915, whereby the insurers bound themselves to make good to the assured "all such losses damage or misfortune not exceeding the sum of 45,000*l.* in all as they may from time to time sustain by or from any of the causes or defects hereinafter mentioned." The property covered by the policy includes jewellery, pearls, and precious stones of any sort or kind whatsoever while the same are (save as hereinafter provided) in or upon any premises or place whatsoever or being carried or in transit by land or water in the United Kingdom or any country in Europe, and also whilst being carried or in transit by sea from any port or place in the United Kingdom or Europe to any other port or place in the United Kingdom or Europe, Spain and Russia excepted. The perils which the insurers are contented to bear are "the loss of damage or misfortune to the before-mentioned property or any part thereof arising from any cause whatsoever whether arising on land or water," with certain exceptions not material for the present purpose. Between June 16 and July 22, 1914, the plaintiffs in the ordinary course of business sent certain pearls of great value to some of their regular trade customers in Germany and Brussels on sale or return. The date of April 1 in the particulars in the points of claim should be June 16. The documents which passed between the parties show that these goods remained

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pose of enabling the plaintiffs to state whether, in the event of the Court being of opinion that the evidence did not show a loss of the pearls within the meaning of the policy, they would elect to take an order discontinuing the action under Order XXVI., r. 1, instead of having judgment entered for the defendant. The plaintiffs' counsel refused to elect on the ground that it might prejudice the right of appeal to the House of Lords.

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Swinfen Eady L.J.

the property of the plaintiffs until invoiced to the consignee. The advice covering the despatch of the goods on approval contained this note at the foot of it: "On sale for cash only or return. Goods had on sale or return remain the property of Moore & Gallop until invoiced by them. These goods must not leave your hands without our permission." The plaintiffs have not received back the pearls or any of them. In the ordinary course of business such goods so sent on approval remain with the consignee for two or three weeks to give him an opportunity of selling them. After that interval the consignor would communicate with the consignee. By arrangement between the parties the period during which goods on approval are left with the consignee may be prolonged for several months, but a period of six months would be unusual. On July 31, 1914, by reason of the political situation then existing, the plaintiffs wrote to their customer at Frankfurt-am-Main in Germany asking him to return the pearls by registered post if perfectly safe to do so, but have received no answer to this letter. On August 4, 1914, they telegraphed to their customer in Brussels inquiring about their goods, and on August 5 he replied as follows: "Impossible send goods postal communication no longer assured since several days have placed in safety in bank. If you accept responsibility for returning will send to you." To which the plaintiffs replied: "Leave goods in safety in bank." By reason of the war with Germany and the occupation of Brussels by the Germans, which took place on August 20, 1914, it has become impossible for the plaintiffs during the war to recover or resume possession or control of their said goods, which at the outbreak of war were respectively in Germany and in Brussels. The plaintiffs are unable to communicate with Germany or with Brussels, and they have no further information with regard to their goods. On October 22, 1914, the plaintiffs made a claim under the policy for a total loss of the goods then alleged to have arisen, and the defendant disputes that any loss has been established.

There is not any evidence to show that the jewels sent to Frankfurt-am-Main have not remained during the war in the possession of the customer to whom they were entrusted by the plaintiffs; it may be that the only reason they have not been returned to the plaintiffs is the impossibility of communicating with them. And so

with regard to the jewels placed in the bank at Brussels. The only reason why these were not returned from Brussels on August 5 was that postal communication was not then assured. For aught that appears in evidence, these jewels have remained in safety ever since in the bank in Brussels.

These are the undisputed facts of the case, and the question is whether the plaintiffs upon evidence establishing these facts have proved a loss under the policy. The policy is a policy on goods and not on an adventure. The doctrine of the frustration of an adventure does not, in our opinion, apply to this case. The goods are covered by the policy when being carried or in transit by land or sea, but it is not a policy which insures the transit, like a voyage, so that if the transit cannot be effected or completed a loss arises equivalent to the frustration of a voyage. Rowlatt J. pointed out that the German consignees had not merely been prevented from selling the goods, but also from performing the alternative of returning them. But this alone is not a loss covered by the policy.

Again the policy is to cover loss, damage, or misfortune sustained by the assured "by or from any of the causes or defects hereinafter mentioned," i.e., the loss of, damage or misfortune to the property arising from any cause whatever, save and except as therein mentioned. There must either be loss of the property or part of it, or damage or misfortune to it. There is no evidence that anything has happened to the goods themselves beyond what I have already mentioned. The goods have not been returned to the plaintiffs. That is all. If the plaintiffs' customers to whom the goods were sent, availing themselves of the difficulties created by the war, dishonestly refused to return the goods and appropriated them to their own use, this event would be covered by an exception contained in the policy, and would not occasion a loss giving rise to a claim. The assured would not have any claim against the insurers if the jewels were lost to the plaintiffs under such circumstances. There is not any suggestion of this having happened in fact. We only mention it as showing that, even if the jewels be lost, it is possible that such loss may have happened without giving rise to a claim under the policy. Moreover, the evidence of the plaintiffs is consistent with the goods having been carefully preserved during the whole period

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of the war, and with their having remained in the possession of the consignees, or in the bank in which they were placed by the consignees, with the intention of returning them safely to the plaintiffs when communication shall be restored. In our opinion the plaintiffs' evidence is not sufficient to establish a loss under the policy. The burden of proving a loss is upon the persons alleging it.

We recognize, however, that it is quite possible that the plaintiffs may have a present right of action, although they have not been able to adduce evidence which proves it. If the plaintiffs had desired it, we should have been prepared to make an order under Order XXVI., r. 1, that the action be discontinued, instead of simply allowing the appeal and directing the judgment to be entered for the defendant. The effect of this would have been that the plaintiffs would have been able at a future time to bring a fresh action if further evidence were available to prove their loss. Mr. Leslie Scott, however, intimated that he did not desire to elect to take any order in that form, in order (as we gather) that he might not prejudice his right to appeal to the House of Lords. Under these circumstances the order will simply be that the appeal be allowed and judgment entered for the defendant with costs here and below. But it will still be open to the plaintiffs, if they appeal, to ask the House of Lords to make such an order as we have indicated, if they should fail there on the merits.

BANKES L.J. read the following judgment:—This appeal raises what is to my mind a very difficult question. The facts are not in dispute. They are fully set out in the report of the case in the Court below. (1) It is not disputed that the policy is not a marine policy. In my opinion the policy is a policy upon the goods enumerated therein, and not a policy upon any adventure connected with those goods. On this point I agree with the view taken by Rowlatt J., and I did not understand the learned counsel for the respondents as objecting to this view. The contention for the respondents was that they had been deprived of the possession of the goods in consequence of the war, and that they continued deprived of them during the currency of the policy under such circumstances as to constitute a total loss; and further that a total loss occurs when an

(1) [1916] 1 K. B. 479.

owner of goods has lost possession of them and cannot foresee the possibility of resuming it.

In order to test the correctness of the respondents' claim it is necessary to arrive at a conclusion on a number of points both with reference to the construction of the policy and as to the principles of law applicable to the facts of this case. The first question to be decided in reference to the construction of the policy is how far it is legitimate to take into consideration the fact that the plaintiffs are engaged in a business of which the goods covered by the policy form part of the stock in trade. In my opinion that question must be answered by a reference to the terms of the policy. The policy treats the goods as part of the plaintiffs' stock in trade, or entrusted to them in the course of their trade, and the cover extends to the goods not only while they are in this country, but also while they are (with certain exceptions) in any country in Europe, and also while they are being conveyed, whether by sea or land or water, between places in this country or abroad or between places in this country and places abroad. The parties must therefore be treated as contemplating that whilst the goods are covered by the policy they will be, or may be, sent abroad by the plaintiffs in the course of their business. To this extent it is clearly legitimate to consider the policy as a business policy (to use the term applied by Bailhache J. to the policy he was considering in *Mitsui* v. *Mumford* (1)). The fact that the policy is a business policy does not, however, justify a construction the effect of which would be to convert it from a policy on the goods themselves into a policy upon a series of adventures by the plaintiffs with the goods.

Starting then with the proposition that the policy is upon the goods themselves, and for a fixed period of time ending on January 7, 1915, at what point of time have the facts to be ascertained in order to decide the question between these parties ? On this point I adopt the language of Kennedy L.J. in the case of *Polurrian Steamship Co.* v. *Young* (2), where he says : " Now it is indisputable that, according to the law of England, in deciding upon the validity of claims of this nature between the assured and the insurer, the matters must be considered as they stood on the date of the commencement of the action. That is the governing date." The date

(1) [1915] 2 K. B. 27, 31. (2) [1915] 1 K. B. 922, 927.

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of the writ in the present case was February 16, 1915. How did matters stand on that date? In the statement of facts as reported in the Court below (1) this passage occurs: "There was no evidence that the jewellery had been seized or specifically interfered with by the German authorities. Some of it had been deposited by the consignees in a bank for safe custody, and the remainder was assumed to be still in their possession at the date of the hearing." Rowlatt J. summarizes the position thus (2): "Under those conditions the goods were in Germany. There is no evidence that anything has happened to the goods themselves in respect of their physical custody. They have not been specifically interfered with. Some of them when last heard of were in a bank in the names of the plaintiffs' consignees. None of them have been taken out of the possession of the consignees." No attempt was made in this Court to challenge the correctness of either of these statements, and if they are confined to a conclusion as to the result of the evidence then before the Court they appear to be correct.

The next point to be considered is how far the law of marine insurance is applicable to the present case, or how far assistance can be derived from a consideration of decisions which dealt with marine policies. In the recent case of *Mitsui* v. *Mumford* (3) the policy was a non-marine policy on goods, and Bailhache J., after pointing out that a constructive total loss and the precedent notice of abandonment, which is an integral part of constructive total loss, are unknown outside marine insurance, and that it would be wrong to use the expression "constructive total loss" in connection with the policy he was then dealing with, goes on to say that in considering whether there has been a loss under the policy it is right to take into account considerations similar to those which are taken into account in determining a question of constructive total loss under a marine policy. He then proceeds to consider the facts of that case from that standpoint. In the more recent case of *Campbell & Phillipps, Ld.* v. *Denman* (4) Bray J. seems to have applied the law of marine insurance to the facts of that case. It becomes necessary to consider how far the views thus expressed by these learned judges are correct. The law of marine insurance recognizes two kinds of

(1) [1916] 1 K. B. 480.
(2) Ibid. 483.
(3) [1915] 2 K. B. 27.
(4) 21 Com. Cas. 357.

losses—(1.) the actual total loss, and (2.) the constructive total loss. Each is now separately defined in the Marine Insurance Act, 1906, the former in s. 57 and the latter in s. 60. A constructive total loss per se does not give the assured a right to claim under the policy as for a total loss. In order to recover he must elect to abandon the subject-matter insured to the insurer and give a notice of abandonment: see ss. 61, 62 of the Marine Insurance Act, 1906. Phillips on Insurance, 3rd ed., s. 1487, in giving his definition of a constructive total loss speaks of it as a constructive or technical total loss. Lord Abinger in *Roux* v. *Salvador* (1), in dealing with cases of total loss and constructive total loss, treats the latter as cases in which the insurer is not bound by the very letter of his contract to pay the sum insured. In an earlier passage (2), where he is tracing the history of the law, he speaks of a constructive total loss as a partial loss. He says: "When assurances came to be considered as contracts of indemnity, and not as mere wagers, it became necessary to make some rules for the conduct of the parties, where the loss was partial, as well as to secure to the assured, when it was total, the full measure of his indemnity, and no more. The obligation of abandonment was the necessary consequence of confining the object of the contract to a strict indemnity." Having regard to the fact that the law of marine insurance recognizes the two classes of loss, and to the reasoning which underlies the recognition of a constructive total loss, the correct view appears to me to be that the law of marine insurance does not apply to the present case at all. Some of the considerations which are material when dealing with the case of a constructive total loss may be material when dealing with a case like the present, but if so it is not because the law of marine insurance can be applied to this case, but because there are certain considerations which may be common both to a contract like the present and to a contract of marine insurance. For these reasons it appears to me that the language of Bailhache J. in the case of *Mitsui* v. *Mumford* (3), which was directed only to the case before him, is quite correct, but that the head-note, which extends that language to any and every case of a loss of commercial goods on land, states

(1) 3 Bing. N. C. 286. (2) Ibid. 283.
(3) [1915] 2 K. B. 27.

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the proposition too widely. The same line of reasoning should, I think, be applied to the language of learned judges when deciding cases of marine insurance. Speaking generally, this language has had reference either to some adventure which was covered by the policy which was under consideration, or to some loss using that expression as including a constructive total loss. As instances I would refer to *Holdsworth* v. *Wise* (1) and *Lozano* v. *Janson* (2), and to the passage, s. 1049, in Arnould on Marine Insurance, 9th ed. (p. 1021 of the 2nd ed.), which is founded on the language of Lord Abinger in *Roux* v. *Salvador*. (3) There is much that is instructive in the cases to which our attention has been called, and in the language used in deciding them, but nothing that can be said to be an authority bearing directly on the precise question which we have to determine.

In some of the earlier cases there appears to have been a strong disinclination to extend the operation of a policy in favour of the assured. In *Bainbridge* v. *Neilson* (4) Grose J. says: "If there be no express decision on the point, we must resort to principle in deciding it. And one of the best principles upon this subject is that no artificial reasoning shall turn that into a total loss, which in fact is only a partial loss." In *Anderson* v. *Wallis* (5) Lord Ellenborough had to consider a case of an adventure where owing to perils insured against a whole season had been lost. The decision was in favour of the insurers, and Lord Ellenborough says (6): "But what case has ever yet decided that such a temporary retardation is a good cause of abandonment, so as to amount to a total loss? Disappointment of arrival is a new head of abandonment in insurance law." And: "But the case of an interruption of the voyage does not warrant the assured in totally disengaging himself from the adventure, and throwing this burthen on the underwriters." In *Everth* v. *Smith* (7) Lord Ellenborough had to consider a claim on a policy for loss of freight as the result of the vessel being detained for the winter in the Baltic owing to ice. He says (8): "It is certainly a loss of the particular trade which the assured had personally in contempla-

(1) (1828) 7 B. & C. 794.
(2) (1859) 2 E. & E. 160.
(3) 3 Bing. N. C. 279.
(4) (1808) 10 East, 329, 344.
(5) (1813) 2 M. & S. 240.
(6) Ibid. 247, 248.
(7) (1814) 2 M. & S. 278.
(8) Ibid. 286.

tion, but it is not within the intention of the policy. On the authority of the above cases, as well as upon general principles of law, it appears to us that the mere retardation of the adventure, and the consequent inconvenience and expense arising from it are not a substantive cause of loss where the particular thing assured has not received damage."

A case like the present must, I think, be dealt with on the general principles applicable to the law of contract, and the meaning of the parties must be ascertained by reference to the language they have used, and without any reference to the artificial definitions which are applied to an actual and to a constructive total loss in the law of marine insurance. The risk undertaken by the insurers under the policy under consideration was "the loss of damage or misfortune to" the goods arising from any cause whatever. The language used is that in general use in policies intended to cover all kinds of risks. Having regard to the nature of the goods covered by this policy, no meaning can, I think, be given to the word "misfortune." The word "loss" in such a policy as this may have a very different meaning when applied to perishable goods, or to goods warehoused at a heavy rent, from what should be attributed to it when applied to such goods as pearls and jewellery when detained under the circumstances of the present case. As applied to this last mentioned class of goods the first and natural meaning of the word "loss" seems to me to be the being deprived of them. It is manifest, however, that it is not every kind of deprivation which was within the contemplation of the parties. Mere temporary deprivation would not under ordinary circumstances constitute a loss. On the other hand complete deprivation amounting to a certainty that the goods could never be recovered is not necessary to constitute a loss. It is between these two extremes that the difficult cases lie, and no assistance can be derived from putting cases which are clearly on the one side or the other of the dividing line between the two. If assistance is to be obtained at all from considering a hypothetical case it can only be done by taking one which raises somewhat similar considerations to the case which we have to decide. One such case occurs to me. Assume that from fear of a bombardment a man places his safe containing his jewels which are insured against loss in his cellar. His house is bombarded and reduced to ruins,

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and many tons of debris are piled upon the cellar, which is itself uninjured. Has the owner of the jewels sustained a loss of them merely because he cannot get at them until the debris is removed? I think not. Assuming that the time when he will be able to get at them is quite indefinite owing to the mass of material to be moved and the lack of labour, has he under those circumstances sustained a loss of the jewels? I think not. Assume that the military authorities for sufficient reasons connected with the defence of the realm take possession of the ruins and refuse the owner access to them until the termination of hostilities, or for an indefinite time, does that constitute a loss of the jewels within the meaning of the policy? I think not. In the cases I am putting the jewels are known to be in the cellar and unharmed. They must remain where they are till the debris can be cleared, but they will be ultimately recoverable. When that can be done is quite uncertain. It may not be for a very considerable time. In the case of the military taking possession the owner may be said to be dispossessed, but in my opinion none of the circumstances I have indicated constitute such a loss of the jewels as is contemplated by the parties to a policy such as the one we are now considering, and that whether the owner be a trader or a private person. In the present case it is, I think, very material to keep steadily in mind the fact that at the time of action brought there was no evidence that the subject-matter of the insurance was not in the custody of the persons to whom it had been entrusted by the plaintiffs, or in the custody of the bank to which with the plaintiffs' subsequent approval a portion of the goods had been sent. It is quite inadmissible to conjecture whether since the policy expired they may have been improperly dealt with. If they have, they may have been lost, but any such loss occurred after the policy had ceased to attach. The most, I think, that can be said in relation to these goods is that during the currency of the policy a state of things was set up in consequence of the war which rendered it impossible for the plaintiffs either to obtain access to their goods, or for the persons in whose hands they were to return them; and that, forming the best opinion that could be formed at the time of action brought, it was probable that that state of things would continue for some considerable time. Does this constitute a loss within the meaning of the policy? I think not. I cannot attempt a

definition of what constitutes a loss, but I find in the language of Blackburn J. in *Wilson* v. *Jones* (1) a sentence in which I think I see a clue which may help to solve the problem in hand. It is true that he is speaking of a marine insurance and of a total loss when he says : " If the interest was an interest in the cable being laid at any time, there was still a total loss ; for although there was some chance of the cable being recovered, it was a mere chance." I think these last words are applicable to a case like the present. If the true conclusion from the facts existing at the time of action brought was that the plaintiffs' chance of recovering their jewels was a mere chance, then the plaintiffs might be entitled to recover on the ground of a loss of the jewels. On the other hand, if the facts indicated that the chance was all the other way, and that there was no reason to suppose from anything that had happened up to the date of trial that the plaintiffs would not ultimately recover their goods, though they might have to wait a long time for them, then I consider that what the plaintiffs have lost is, not their goods, but the commercial adventure of sending their goods out on approval and getting them back in due course. The latter is the conclusion at which I have arrived upon the facts as they appeared upon the evidence laid before Rowlatt J., and consequently I think that this appeal should be allowed.

Appeal allowed.

Solicitors for plaintiffs : *W. Hurd & Son.*
Solicitors for defendant : *Windybank, Samuell & Lawrence.*

(1) (1867) L. R. 2 Ex. 139, 152.

W. F. B.

C. A.
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Dec. 11, 18.

[IN THE COURT OF APPEAL.]

GRIFFITH *v.* OWNERS OF SAILING SHIP PENRHYN CASTLE.

Employer and Workman—Compensation—Workman—Remuneration—Remuneration exceeding 250l. a Year—Contract for Less than a Year—Probable Average Earnings for Rest of Year Less than Earnings under Contract—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13.

In order to bring a man within the exception in the definition of a workman in s. 13 of the Workmen's Compensation Act, 1906,—"'Workman' does not include any person employed otherwise than by way of manual labour whose remuneration exceeds two hundred and fifty pounds a year"—it must be shown that he was at the date of the accident entitled to remuneration of more than that amount under a contract of service, which contract, unless determined by notice or other extraneous fact, would continue in force for a year.

THE following statement of the facts of the case is taken from the judgment of Warrington L.J. :—

The appellant was the widow of one Hugh Griffith, who was lost at sea when in command of the ship *Penrhyn Castle*, belonging to the respondents. She claimed compensation for her husband's death. Liability was admitted subject to the question whether the deceased was a workman ; the respondents contended that he was not, inasmuch as his remuneration exceeded 250*l.* a year.

The county court judge had found in their favour and dismissed the claim. The facts are not in dispute.

The deceased man had been years ago a master mariner in command of various ships belonging to the defendants. He had retired and had for some time been employed as overlooker, i.e., to take charge of ships in port in the absence of their captains. For this he was paid 10*s.* a day when actually employed, and his earnings amounted to about 130*l.* a year. In February, 1915, the defendants asked Griffith to go for them to Bahia Blanca and there take charge of the *Penrhyn Castle* in lieu of the then captain, with whose conduct they were dissatisfied. Having done this, he was to sail the ship to Freemantle ; if the charterers, who had an option in the matter,

desired the ship to proceed home, he was to sail her home. If she was to sail elsewhere, then he need not take her, but was to return by passenger ship. He was to be paid 10*l.* a month while on the voyage out, 20*l.* a month with his board while in command of the ship, and 10*l.* a month again on the passenger ship on the voyage home should he not bring the ship home. The probable duration of the entire employment would not exceed six months. He arrived at Bahia Blanca, sailed with the ship on April 19, and had not been heard of since. It was assumed that the ship was lost with all hands on the voyage to Freemantle. At the time of the loss the remuneration under the contract was 24*l.* 10*s.* per month, namely, 20*l.* for wages and 4*l.* 10*s.* for board.

Greer, K.C., and *Clement Davies*, for the appellant. The county court judge has taken the view that as the applicant's husband was receiving 24*l.* 10*s.* under this contract at the moment of his death, he had nothing to do but multiply that by 12 to get at the remuneration referred to in the definition clause in s. 13 of the Workmen's Compensation Act, 1906. But the contract was not for a whole year. It could not last more than six months and might last less. And for a considerable part of the time during which the contract was in force the remuneration would be only 10*l.* a month. The county court judge's interpretation would read into s. 13 remuneration "at the rate of" 250*l.* a year. *Williams* v. *Owners of S.S. Maritime* (1) decided that the Court could only look at the existing contract of service and could not take into consideration what the man had earned under similar contracts. *Skailes* v. *Blue Anchor Line* (2) only decided that all the advantages to which the man was entitled under the contract must be taken into account in assessing the remuneration under s. 13 as well as under Sched. I., clause 2 (*a*). That makes no difference here; our point is that there is nothing to show that the annual remuneration was above the limit.

J. H. Layton, for the respondents. The construction of s. 13 as referring to remuneration exceeding "the rate of 250*l.* a year" was certainly adopted in *Skailes* v. *Blue Anchor Line* (2), and is implied in *Williams* v. *Owners of S.S. Maritime.* (1) There it was decided

(1) [1915] 2 K. B. 137. (2) [1911] 1 K. B. 360.

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that the Court cannot look at a past state of things before the contract; it follows that it cannot look at the future state of things which may arise when the contract is over. It is plain that the Court could not consider what the workman had earned or might earn under other contracts with other employers, and it makes no difference that the employers are the same persons. There was no contract that the man should return to overlooker's work when his work on the *Penrhyn Castle* was over.

Greer, K.C., in reply.

Cur. adv. vult.

Dec. 18. WARRINGTON L.J. The question is whether the county court judge has applied the right principle in arriving at his conclusion. This is, in my opinion, a question not of fact, but of law, on the construction and effect of the Act, and is therefore open to review. [The Lord Justice stated the facts as above and continued:] The judge has thought that all that had to be done was to multiply 24*l.* 10*s.* (the monthly wage he was receiving at the time of his loss) by 12, and that as the sum thus obtained exceeds 250*l.* a year, he was therefore not a workman.

The appellant contends that the mode of calculation adopted by the judge was wrong. It is true that at the moment the accident occurred the remuneration he was entitled to was 24*l.* 10*s.* per month, namely, at a rate per annum exceeding 250*l.*, but this she says does not show that his "remuneration exceeded 250*l.* a year" within the meaning of the statute.

The question turns on the construction and effect of the definition of "workman" contained in s. 13 of the statute. The material words are as follows: "'Workman' does not include any person employed otherwise than by way of manual labour whose remuneration exceeds 250*l.* a year . . . . but, save as aforesaid, means any person who has entered into or works under a contract of service with an employer." I think on the true construction of this section the remuneration referred to is that which is incident to the contract of service with the employer against whom compensation is claimed. The question then is, Does the remuneration incident to that contract exceed 250*l.* a year? The contract in the present case was one which would last for a shorter period than a year, and the total

amount which could be earned under it was less than 250*l.* Under these circumstances it seems to me impossible to say that the remuneration under this contract exceeded 250*l.* a year.

The principle adopted by the learned judge involves reading the section as if it contained the words "at the rate of," and in my opinion a sensible construction can be given to the section without reading in those words, and to do so would therefore be improper. If the contract is one which may continue more than a year, and the servant as incident to that contract earns or but for some circumstance determining his earning power would be able to earn in a year a sum exceeding 250*l.*, then I think he would be within the exception, although at the moment of the accident the remuneration he was actually earning might be at a lower rate than that of 250*l.* per annum. So, on the other hand, if the actual or assumed earnings be less than 250*l.* in the year the man would be a workman although at the moment of the accident the remuneration he was actually earning was at a higher rate. The fact that the contract may be determined by notice or other circumstances seems to me to be immaterial if it can fairly be said to be a contract for a year or upwards.

I abstain from saying anything by way of attempted solution of the many hypothetical questions which have been put in the course of the argument. It is sufficient to say that in the present case at all events the judge has adopted a wrong principle in ascertaining whether the remuneration exceeds 250*l.* a year, and that in my opinion the remuneration under the contract now in question did not exceed that sum, and accordingly the man ought to have been treated as a workman and an award made in favour of the applicant.

SCRUTTON L.J. This is an appeal by the widow of Captain Griffith from a decision of the county court judge at Pwllheli refusing her compensation for the death of her husband on the ground that he was not a workman as at the time of his death his remuneration exceeded 250*l.* a year. [The Lord Justice stated the facts as above and continued :]

The county court judge has found on these facts that the "rate of remuneration at the time of death exceeded 250*l.*," and has

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therefore held that the deceased was not a workman within the Act. The words of the Act are "'Workman' does not include any person employed otherwise than by way of manual labour whose remuneration exceeds 250*l*. a year." It does not say in terms what year is to be considered, or whether other remuneration, either past or prospective, than that which the man was earning at the time of his death is to be taken into account.

The respondents say the matter is comparatively simple: what remuneration was the man receiving at the time of his death? If continued for a year at the same rate, would it exceed 250*l*.? If it would, the man is not a workman. They decline to consider whether the employment is temporary or would last less than a year. Asked if a man who at the time of his death had a contract for one month only at 30*l*. a month was a man "whose remuneration exceeded 250*l*. a year," they said boldly "Yes"; and would, I suppose, make the same answer as to a man engaged for one day at 1*l*. a day who dies on that day from injuries arising out of and received in the course of his employment. The difficulty of this construction is that it requires some such words to be inserted in the Act as "at the rate of" remuneration exceeding 250*l*. per annum. And having made this insertion, as it is difficult to believe that it can be said of a man with one month's contract for 30*l*. that his remuneration exceeds 250*l*. per annum, one would be asked to make another insertion or implication of some such words as "provided the contract is such that he may be reasonably expected to be employed for a year" or "to earn 250*l*. in a year by it or other employment." When one has got to this extent of implication I think one is framing a new Act of Parliament, not construing the words Parliament has used, which process, even if Parliament did not think of the difficulties of the language they employed, is, I think, the only safe canon of construction.

Parliament has spoken of "remuneration," not earnings, and has not incorporated in this case either the three years' or one year's conventional rule it has applied to get the amount of compensation from the workman's previous earnings. It speaks of persons "employed" at a "remuneration," and I think this language must be confined to the employment in which the accident happens and the remuneration is earned, and that we cannot make up a

year's income out of several employments at various remunerations. The man is not a workman if the remuneration of his employment exceeds 250*l.* a year. I think this must be limited to remuneration under contract, and not extended to possible earnings in the future. In my view, to satisfy the words of the Act it must be shown that there is a contract of employment which, unless determined by notice or by some extraneous fact such as death or the destruction of the subject-matter of the contract, will last a year and produce a remuneration of over 250*l.*; and it is not enough to show a contract for less than a year at a remuneration of less than 250*l.*, as a six months' contract for 150*l.* This construction appears to me to give effect to the words used, "employment at a remuneration exceeding 250*l.* a year," and not to require any words, such as "at the rate of," to be written in, or to involve any difficulties as to what year, whether past or future, is referred to. It also avoids the difficulties as to seasonal employment where a man may make in the year less than 250*l.*, but during part of the year may be engaged at a rate which if multiplied for the year would exceed 250*l.*, while in fact he is making much less.

We were referred to certain cases, but as they do not, in my view, help us on this point, I do not consider them further. I think the appeal should be allowed with costs, and the matter remitted to the county court judge to assess compensation under the Act.

LORD COZENS-HARDY M.R. I agree. The appeal must be allowed with costs here and below.

Solicitors for appellant: *Rhys Roberts & Co., for Lloyd-George & George, Criccieth.*

Solicitors for respondents: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

J. R. B.

1916
Dec. 7.

COHEN AND ANOTHER *v.* POPULAR RESTAURANTS, LIMITED.

[1916 C. 1648.]

Landlord and Tenant—Lease—Covenant not to assign without Licence—Assignment of Lease to a Company—Voluntary Liquidation—Assignment by Liquidator without Licence—Breach of Covenant—Measure of Damages.

A company were assignees of a lease containing a covenant by the lessee not to assign the demised premises without the lessor's previous licence and consent in writing not to be unreasonably withheld in case of a respectable and responsible person being offered as tenant. The company went into voluntary liquidation, in which the liquidator without the licence or consent of the lessor assigned the lease without offering a responsible person as tenant :—

Held, that this constituted a breach of the covenant not to assign.

In re Riggs [1901] 2 K. B. 16 distinguished.

Held, also, that the lessor electing to avoid the lease could assess once for all the amount which he had lost by having an insolvent tenant instead of the company, and could prove for that amount in the liquidation, and was not bound to wait and prove for each quarter's rent as it fell due.

TRIAL of action before Rowlatt J. without a jury.

The action was by a lessor or his executors against lessees for breach of a covenant not to assign the lease without licence. On October 1, 1897, one Isaac Cohen granted to Frank Wilkinson and Henry James Vickers a lease of a house known as 37, High Street, Southwark, for a term of twenty-one years from September 29, 1897, at the rent therein mentioned. The lease contained a covenant by the lessees not to assign the premises without the lessor's previous licence and consent in writing not to be unreasonably withheld in case of a respectable and responsible person being first offered as tenant.

On December 6, 1899, the lessees assigned the lease by a duly authorized assignment to certain mesne assignees, who on February 1, 1912, assigned it by a duly authorized assignment to the defendants.

On April 10, 1916, Isaac Cohen died, and the reversion on the lease of October 1, 1897, became vested in the plaintiffs as his executors.

The shareholders of the defendant company having passed a resolution for a voluntary winding up of the company, on June 22, 1916, the liquidator of the company, without obtaining the licence or consent of the plaintiffs and without offering a responsible person as tenant, assigned the lease to a person who was unable to pay the rent and perform the covenants in the lease.

The plaintiffs claimed damages, or alternatively a declaration that the defendants were liable until the expiration of the term to pay the rent reserved by the lease and to perform the lessee's covenants therein contained.

Arthur Powell, *K.C.*, and *Stuart Bevan* (*H. Geen* with them), for the plaintiffs. There has been a clear breach of the covenant not to assign. That is a covenant which runs with the land. The measure of damages is that sum which will compensate the plaintiffs for having lost the defendants as tenants and being forced to look for their rent to an insolvent assignee : *Williams* v. *Earle*. (1)

Cunliffe, *K.C.*, and *Frampton*, for the defendants. A covenant not to assign has reference to assignments by act of the party, but not to assignments by operation of law : *Doe* v. *Bevan*. (2) Therefore an assignment by a liquidator of a company which is being wound up compulsorily is not a breach of the covenant : *In re Birkbeck Permanent Benefit Building Society*. (3) It has been held that an adjudication of bankruptcy on the debtor's own petition is not a breach of the covenant : *In re Riggs*. (4) It should follow that an assignment by a liquidator in a voluntary winding up under s. 182, sub-s. 2, and s. 186 of the Companies (Consolidation) Act, 1908, which is analogous to an adjudication in bankruptcy on the debtor's petition, is not a breach of the covenant.

Secondly, only rent which has accrued due up to the present time and damages already suffered can be recovered. The Court will not impound the assets of the company to meet future claims : *In re Haytor Granite Co.* (5) ; *In re London and Colonial Co., Horsey's Claim* (6) ; *In re New Oriental Bank Corporation* (No. 2) (7) ; *In re Panther Lead Co.* (8)

(1) (1868) L. R. 3 Q. B. 739.
(2) (1815) 3 M. & S. 353.
(3) [1913] 2 Ch. 34.
(4) [1901] 2 K. B. 16.
(5) (1865) L. R. 1 Ch. 77.
(6) (1868) L. R. 5 Eq. 561.
(7) [1895] 1 Ch. 753.
(8) [1896] 1 Ch. 978.

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COHEN v. POPULAR RESTAURANTS, LIMITED.

ROWLATT J. This is an action brought against a company in voluntary liquidation for breach of a covenant in a lease not to assign the demised premises. The defendants are themselves assignees of the lease, but the burden of a covenant not to assign runs with the land. The company went into voluntary liquidation, and the liquidator assigned the lease to a married woman of no financial position. The company contend that no breach of the covenant is committed where the assignment is by a liquidator in a liquidation. Prima facie a covenant not to assign does not extend to prohibit an assignment by a person who takes the lease by operation of law together with a duty to dispose of it: *Doe* v. *Bevan* (1), a case referred to by Neville J. in *In re Birkbeck Permanent Benefit Building Society.* (2) The latter case raised the question whether a policy of insurance had been forfeited upon assignment by the assured, a company. Assignment by operation of law was expressly excepted from the causes of forfeiture. The company was ordered to be wound up by the Court. Neville J. said: "*Doe* v. *Bevan* (1) clearly shews that prima facie a contractual restriction of assignment does not apply to the assignment by a person on whom the property has devolved by operation of law, and who is under an obligation to assign. Of course, you may have so contracted as to include such a case, but the mere condition against assignment does not prima facie include it. And that this condition was not intended to include it is I think to be found not only from the general construction which ought to be placed upon such a condition, but also from the fact that we have in the conditions a direct elimination of the case of the passing of a policy by operation of law. I do not think, therefore, it was ever intended to apply to an assignment by a person in whom the policy became vested, not by a voluntary act of the insured but by the operation of law, and who then was under an obligation to assign to somebody else." That was a case of a compulsory winding up and an assignment by the officer of the Court. An assignment under those conditions was held not to be the voluntary act of the assured. Here the facts are otherwise. The assignment was the act of a liquidator brought into existence by the voluntary act of the company, the passing of a special resolution to wind up the company voluntarily. Mr. Cunliffe contended that this was not the

(1) 3 M. & S. 353. (2) [1913] 2 Ch. 34, 38.

voluntary act of the company because the powers of a liquidator are conferred upon him by s. 186 of the Companies (Consolidation) Act, 1908, and that the fact that the resolution was voluntary is irrelevant. He referred to the judgment of Wright J. in *In re Riggs.* (1) In that case a lease of a house contained a covenant not to assign and a proviso for re-entry in case the lessee should file any petition under the bankruptcy laws. The lessee filed a petition in bankruptcy upon which he was adjudicated a bankrupt, and the lessor purported to determine the lease under the proviso for re-entry. Wright J. held that the re-entry was bad. Then came the question whether the bankruptcy was a breach of the covenant not to assign. On that point the learned judge said (2): "On the construction of this lease, and apart from authority, I should be of opinion that in this covenant the words 'assign or underlet' are used in their ordinary or popular sense, and refer only to such assignments as are directly made by the lessee as distinguished from such assignments by law as result by the statute from a petition in bankruptcy followed by adjudication. This conclusion seems much strengthened by the fact that the proviso, which immediately follows the covenant, expressly provides for the case of bankruptcy or of the filing of a petition by the debtor. And it would be strange if, notwithstanding the express mention of bankruptcy as a ground for re-entry, and the express obligation to give notice before re-entry on that ground, the obligation can be evaded on the ground that the bankruptcy operates in law as an assignment." So far the judgment proceeds upon the construction of the words "underlet or assign" in that particular lease. At the end of the judgment it is pointed out that if the debtor's own petition created an assignment, then a forfeiture would accrue without the necessity of serving any notice under the Conveyancing Acts; but that the presentation of a petition by a debtor is not an assignment, there being no assignment until adjudication and no certainty that an adjudication will ever follow. That means that an adjudication is, while a petition is not, an assignment. Referring to *Ex parte Dawes* (3) Wright J. said: "The case seems to be an authority that the mere filing of a petition by a debtor is not of itself an assignment. And if so, then there is in

(1) [1901] 2 K. B. 16. (2) [1901] 2 K. B. 21, 22.
(3) (1886) 17 Q. B. D. 275.

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any view no assignment until adjudication, and at that stage the matter has become actual bankruptcy." But in *In re Riggs* (1) a bankruptcy had actually taken place. The lessee had been adjudicated a bankrupt. The present case is quite different. In a voluntary liquidation there is nothing equivalent to an adjudication. A company may use the process of voluntary liquidation when perfectly solvent merely as machinery for reconstructing itself on a sounder basis. The company whose liquidator in such circumstances assigned an onerous lease to a man of straw could not be heard to say that the assignment had taken place by operation of law and not by its own voluntary act. There is no essential difference between such an assignment and that in the present case; if the former assignment is tinged with the taint of voluntariness so is the latter. I think there is all the difference between an adjudication in bankruptcy and a voluntary winding up, and that therefore the first point fails.

The second point was that only such damages as have already accrued can be recovered. The measure of damages, according to *Williams* v. *Earle* (2), is the loss which the plaintiffs have sustained by the substitution of the assignee as tenant instead of the defendants, the assignors. Mr. Cunliffe has contended that I cannot consider rent accruing or covenants falling due to be performed in the future, but only rent now in arrear and damages already sustained for breaches of covenant. He cited several cases in equity in which it was held that a lessor applying in the winding up of a company who were his lessees under a subsisting lease had to prove for his rent as it fell due and could not impound the assets of the company to answer future claims. In *In re Panther Lead Co.* (3) it was pointed out that at the present day when liabilities in a winding up are computed and proved for once for all the principle of those earlier cases would require reconsideration. But, however that may be, in order to apply Mr. Cunliffe's contention I must treat the lease as subsisting, whereas this claim is upon the basis that the lease has ceased and determined. The action is for damages for breaches of covenant in a lease which has come to an end. The plaintiffs must assess their damages once for all in a single sum

(1) [1901] 2 K. B. 16. (2) L. R. 3 Q. B. 739.
(3) [1896] 1 Ch. 978.

such as will put them in the same position as if they had still the defendants' liability instead of the liability of another of inferior pecuniary ability. Therefore on this point also I am in favour of the plaintiffs.

The measure of damages so stated involves a consideration of the financial position of the defendants and their assignee respectively. Assuming the assignee to be insolvent, according as the defendants have more or less means there will be more or less damage; if they are without means there will be no damage. Unless the parties can come to some agreement the liquidator must attend and give evidence as to the position of the defendant company.

[The liquidator ultimately agreed to accept a proof for 200*l.*, and a declaration was made that the plaintiffs were at liberty to put in a proof for that amount.]

Judgment accordingly for plaintiffs.

Solicitors for plaintiffs: *Harris, Chetham & Cohen.*

Solicitors for defendants: *Penman & Brown.*

W. H. G.

K. B. D. 1916 *Oct.* 19, 20, 24 C. A. *Dec.* 7, 8.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

THE KING *v.* THE GENERAL COMMISSIONERS FOR THE PURPOSES OF THE INCOME TAX ACTS FOR THE DISTRICT OF KENSINGTON.

Ex parte PRINCESS EDMOND DE POLIGNAC.

Revenue—Income Tax—Profits arising from Foreign Possessions—Place of Assessment—Jurisdiction of Commissioners at Place of Residence—Retrospective Effect of Legislation—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 106—*Taxes Management Act,* 1880 (43 *&* 44 *Vict. c.* 19), *s.* 52—*Finance (No.* 2) *Act,* 1915 (5 *&* 6 *Geo.* 5, *c.* 89), *s.* 32 — *Practice — Rule nisi—Prohibition—Misleading Affidavit—Summary Discharge of Rule—Inherent Power in Court.*

If on the argument showing cause against a rule nisi the Court comes to the conclusion that the rule was granted upon an affidavit which was not candid and did not fairly state the facts, but stated them in such a way as to mislead and deceive the Court, there is power inherent in the Court, in order to protect itself and prevent an abuse of its process, to discharge the rule nisi and refuse to proceed further with the examination of the merits.

In April, 1916, the General Commissioners for the Purposes of the Income Tax Acts for the district of Kensington made an additional assessment upon the applicant for the year ending April 5, 1913, in respect of profits arising from foreign possessions. On May 16, 1916, the applicant obtained a rule nisi directed to the Commissioners calling upon them to show cause why a writ of prohibition should not be awarded to prohibit them from proceeding upon the assessment upon the ground that the applicant was not a subject of the King nor resident within the United Kingdom and had not been in the United Kingdom, except for temporary purposes, nor with any view or intent of establishing her residence therein, nor for a period equal to six months in any one year. In the affidavit on which the rule was obtained the applicant stated that she was a French subject and resident in France and was not and had not been a subject of the United Kingdom nor a resident in the United Kingdom; that during the year ending April 5, 1913, she was in the United Kingdom for temporary purposes on visits for sixty-eight days; that she spent about twenty of these days in London at her brother's house, 213, King's Road, Chelsea, generally in company with other guests of her brother; that she was also in the United Kingdom during the year ending April 5, 1914, for temporary purposes on visits, and spent

part of the time at 213, King's Road aforesaid ; and that since the month of November, 1914, she had not been in the United Kingdom. From the affidavits filed on behalf of the Commissioners and of the surveyor of taxes, who showed cause against the rule nisi, and from the affidavit of the applicant in reply, it appeared that in February, 1909, a leasehold house, 213, King's Road, Chelsea, had been taken in the name of the applicant's brother. The purchase-money for the lease of the house and the furniture amounted to 4000*l.*, and this was paid by the applicant out of her own money. The accounts of household expenses were paid by the brother and subsequently adjusted between him and the applicant.

The Divisional Court, without dealing with the merits of the case, discharged the rule on the ground that the applicant had suppressed or misrepresented the facts material to her application. On appeal:—

Held, that the rule of the Court requiring uberrima fides on the part of an applicant for an ex parte injunction applied equally to the case of an application for a rule nisi for a writ of prohibition.

Held, therefore (affirming the decision of the Divisional Court), that, there having been a suppression of material facts by the applicant in her affidavit, the Court would refuse a writ of prohibition without going into the merits of the case.

Dalglish v. *Jarvie* (1850) 2 Mac. & G. 231, *The Hagen* [1908] P. 189, 201, and *Republic of Peru* v. *Dreyfus Brothers & Co.* (1886) 55 L. T. 802, 803, followed and applied.

Held, also, by the Court of Appeal, that, assuming but without deciding that the applicant was at any time ordinarily residing in Kensington, the Kensington Commissioners had jurisdiction in 1916, by virtue of s. 32 of the Finance (No. 2) Act, 1915, which repealed s. 108 of the Income Tax Act, 1842, to assess her to income tax on profits arising from foreign possessions under s. 106 of that Act for the financial year 1912-13.

RULE NISI for a prohibition.

By s. 2, Sched. D, to the Income Tax Act, 1853 (16 & 17 Vict. c. 34), income tax is payable " for and in respect of annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere."

By s. 106 of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), every person being a householder (except persons engaged in any trade, &c.) shall be charged to the duties in Sched. D by Commissioners acting for the parish or place where his dwelling-house shall be situate ; " and every person not being a householder nor engaged in any trade," &c., " who shall have any place of ordinary residence,

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shall be charged by the Commissioners acting for the parish or place where he shall ordinarily reside."

By s. 39 of the Income Tax Act, 1842, any subject of His Majesty whose ordinary residence is in Great Britain and who has gone beyond the seas for the purpose only of occasional residence is deemed to be a person chargeable as a person actually residing in Great Britain: "provided always that no person who shall . . . . actually be in Great Britain for some temporary purpose only, and not with any view or intent of establishing his residence therein, and who shall not actually have resided in Great Britain at one time or several times for a period equal in the whole to six months in any one year, shall be charged with the said duties mentioned in Schedule D as a person residing in Great Britain, in respect of the profits or gains received from or out of . . . . foreign securities . . . ."

By s. 52 of the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), if the surveyor of taxes discovers that any properties or profits chargeable have been omitted from the first assessments, or that any person chargeable has not made a full and proper return, an additional first assessment may be made. By s. 23 of the Finance Act, 1907 (7 Edw. 7, c. 13), the time during which an additional first assessment may be made shall be at any time within the year of assessment or within three years after the expiration thereof.

In April, 1916, the Commissioners for the purposes of the Income Tax Acts for the district of Kensington made an additional assessment upon the applicant, the Princess Edmond de Polignac, for the year ending April 5, 1913, in respect of profits from foreign possessions.

On May 16, 1916, the applicant obtained a rule nisi directed to the Commissioners calling upon them to show cause why a writ of prohibition should not be awarded to prohibit them from making, allowing, confirming, enforcing, or otherwise proceeding upon the assessment upon the grounds that the applicant was not a subject of the King nor resident within the United Kingdom and had not been in the United Kingdom except for temporary purposes, nor with any view or intent of establishing her residence therein, for a period equal to six months in any one year.

The affidavit on which the rule nisi was obtained stated as follows : " I Winnaretta Eugenie Princesse Edmond de Polignac of 43 Avenue Henri Martin, Paris, widow make oath and say as follows :—

" 1. I am the widow of Prince Edmond Melchior Jean Marie de Polignac deceased and am and have since my first marriage to Louis Marie Wilfrid Prince de Scey Montbehard my first husband in the year 1887 been a subject of the French Republic and resident in France and am not and have not been a subject of the United Kingdom nor a resident in the United Kingdom. I reside and have for many years past resided every year for the most part at my house 43 Avenue Henri Martin, Paris, and occasionally at my house Palazzo Polignac at Venice and pay visits to various other places on the Continent and in the United Kingdom from time to time, when I stay at hotels or at the houses of relatives or friends.

" 2. I have on many occasions been in the United Kingdom for temporary purposes but I have never been there since my said first marriage in the year 1887 with a view or intention of establishing my residence therein nor have I ever resided in the United Kingdom at one time or several times for a period equal in the whole to six months in any one year.

" 3. On April 26 or 27, 1916, I received the paper writing now produced and shown to me marked W. E. P. being a notice of assessment in respect of foreign possessions numbered 4296 for the year 1912-13 which was forwarded to me at my said house 43 Avenue Henri Martin, Paris, from 213 King's Road, Chelsea, which is a house belonging to my brother Mr. W. M. G. Singer.

" 4. During the year ending April 5, 1913, I was in the United Kingdom for temporary purposes on visits for 68 days in all, namely from June 16 to August 21. The greater part of the time I was staying with my friend Lady Colebrooke at her house at Upper Ifold, Dunsfold, Surrey, but paid several visits of a few days' duration to other friends at country houses. I spent a few days in London for the Shakespeare Ball staying at my brother's house, 213 King's Road, Chelsea, and I also stayed there at other times during this period for not exceeding 4 days each and not exceeding 20 days there altogether and generally in company with other guests of my brother. I cannot after this lapse of time supply more exact particulars of the dates of my various visits during this period.

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During the year ending April 5, 1914, I was in the United Kingdom for temporary purposes on visits for about 109 days in all, namely from May 8 to 24, partly at 213 King's Road aforesaid and partly at West End, Petersfield (I have no record or recollection of the number of days spent at each place); from June 21 to August 24 mostly at Upper Ifold, Dunsfold, Surrey, with short visits of 2 or 3 days each to 213 King's Road, The Cottage, Newmarket, Norman Court near Salisbury, Hill Hall, Epping, and Studley Royal, York; 10 days in December partly at the Hotel Ritz, London, partly at Norman Court aforesaid and partly at Armitage Hill, Ascot; 9 days in January at the Langham Hotel, London, 1 night at Paignton, Devon, and 1 day, the 27th, at 213 King's Road, Chelsea aforesaid, which was my last visit there. On none of these occasions was I in the United Kingdom with any view or intention of establishing my residence therein. Since the month of November 1914 I have not been in the United Kingdom.

"5. I am advised and believe that the General Commissioners for the purposes of the Income Tax for the Kensington division of the county of Middlesex, on whose behalf I am informed and believe that the said notice of assessment is sent, have no jurisdiction to make any assessment on me in respect of income from foreign possessions in respect of the year ending April 5, 1913, on the following grounds:—

"(*a*) I am not and have never been since the year 1887 a subject of His Majesty the King of Great Britain and Ireland nor resident within the United Kingdom.

"(*b*) An assessment in respect of the year of assessment ending April 5, 1913, cannot according to the Income Tax Acts be made after 3 years from the expiration of the said year of assessment, and the said assessment was not made before April 6, 1916.

"(*c*) The said General Commissioners for the purposes of the Income Tax Acts for the Kensington division of the county of Middlesex are not commissioners acting for any parish or place in which I ordinarily reside.

"Sworn at the British Consulate-General, Paris, in the Republic of France, on May 12, 1916,

"Before me," &c.,

"British Vice-Consul, Paris."

"Winnaretta Eugenie Princesse Edmond de Polignac.

From the affidavits filed on behalf of the Commissioners and of the surveyor of taxes, who showed cause against the rule nisi, it appeared that in February, 1909, a leasehold house, 213, King's Road, Chelsea, had been taken in the name of Washington Merritt Grant Singer, the brother of the applicant. The purchase-money for the lease of the house and the furniture amounted to 4000*l.*, and this was paid by the applicant out of her own money. An account of the expenses incurred in connection with the purchase was sent to W. M. G. Singer by his solicitors and paid by the applicant. Accounts of the household expenses were at first rendered to the applicant and paid by her; afterwards as an extra precaution they were sent to W. M. G. Singer and paid by him, accounts being adjusted subsequently between him and the applicant.

A telephone agreement dated November 20, 1908, was signed by "Winnaretta de Polignac, address 213, King's Road." An extension agreement dated April 20, 1909, was signed by "W. de Polignac, address 213, King's Road."

A letter dated August 19, 1914, addressed to the telephone exchange in the handwriting of the applicant and signed "W. Singer" contained these words: "The telephone is at present, for my personal convenience, in the name of the 'Princess de Polignac.'"

On July 25, 1912, the solicitors who were then acting for the applicant wrote a letter to Mr. W. M. G. Singer, "Re 213 King's Road, Chelsea, and 66, Glebe Place, Chelsea," saying that, the business having at length been finally completed both as to the original acquisition of the property and also as to subsequent alterations, they enclosed their cash accounts, and concluding thus: "You will understand that the business was taken by us as representing yourself, and we accordingly debit you with the account and deliver it to you, but you will of course know how to deal with the matter according to the private arrangements between yourself and your sister, and we enclose herewith a typed copy of this letter which you may find useful to forward to her."

In her affidavit in reply the applicant explained at length how the house was acquired so that it might be available as a place at which she could stay when occasionally in London in preference to staying at hotels. In paragraph 4 she stated: "I did not reside in the

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United Kingdom and had not the least intention of residing in or becoming a resident in the United Kingdom in the ordinary meaning of the words 'residing' and 'resident,' but I understood that if I bought a house in London it was probable that the Commissioners of Inland Revenue might claim that though I was not resident in the United Kingdom in the ordinary sense of the word I must be taken to be resident there for the purposes of the Income Tax Acts, and might make a claim that I ought to be assessed to English income tax." The applicant went on to state that she discussed this difficulty with the owner of the house, and pointed out to him that she would not purchase it unless she could be assured that no claim would be made by the Commissioners; that the owner submitted the question to his brother, who was one of the Commissioners of Inland Revenue, and that the question and the answer thereto had been forwarded to the solicitor who was then acting for her. In paragraph 5 she stated that she had taken the opinion of counsel. This opinion was to the effect that if she was merely a guest in her brother's house she would not be residing in the United Kingdom within the meaning of the Income Tax Acts. In paragraph 6 she stated: "I declined to sign the contract or proceed with the business unless the transaction could be carried out in such a way as to leave no doubt that I should not be involved in any legal liability whatever for income tax on my income nor prevented from being entitled to obtain remission or return of such tax as above stated. I accordingly approached my brother, Mr. Washington Merritt Grant Singer, and took him to see the property and asked him if he would become the purchaser of it so that . . . . he might invite me to stay at the house for a short time only in each year. My brother at first demurred on the ground that he might become involved in complications by becoming the owner and occupier of two residences in London which might involve double liability to service on juries and matters of that sort, but after consulting with his own solicitors he ultimately agreed to become the absolute purchaser, but stipulated that the business should be carried out by his own solicitors on his behalf with no trouble or expense to him, and in my presence he ultimately gave instructions accordingly and authorised his solicitors to carry out the business for him but to act entirely according to my wishes and to take all

instructions in matters of detail from me on his behalf, and on or about October 12, 1908, all the necessary papers were handed over accordingly by my solicitor to "—the solicitors for Mr. W. M. G. Singer—" and they proceeded in due course to carry out and complete the business on behalf of my brother. I repeated to "— a member of the firm—" my instructions that the matter was to be carried out in such a way that I was not to become legally liable to payment of English income tax or be prevented from obtaining repayment or remission of tax on my foreign income as heretofore. After carefully considering the matter himself, the purport of his advice to my brother and myself on the matter was that my brother must be the actual and real purchaser and owner of the house and premises and also the proprietor of the establishment and the rated occupier and that there must be no sort of trust either written or verbal, express or secret, by my brother in my favour; that the permanent servants on the premises should be employed and paid by him so that they should be in his actual service, and that when I stayed at the house it should be as guest of my brother. Provided that these essential matters were observed and thoroughly understood and acted upon my solicitor informed me that there was no objection whatever to my providing my brother with the whole of the purchase-money and any expenses to which he might be put in maintaining the house in respect of insurance, rates, taxes, and outgoings and upkeep and servants' wages, but there must be no binding contract or agreement between us either in writing or verbal that I should provide these moneys or continue to do so, and that just as on the one hand my brother could at any time do what he liked with regard to the house or the disposal thereof or the conduct of the establishment and, as to its being available for me as his guest when I desired to reside there, there must only be an understanding which would be absolutely revocable by him at his will and pleasure, so on the other hand I should be equally free and at liberty to decline to provide the purchase-money or other moneys necessary for the purchase of and alterations to the house and the upkeep of the establishment, rates, taxes, outgoings, and servants' wages, if I should think fit to decline or discontinue to provide such moneys at any time. I acted in every particular in accordance with this advice and have in fact provided or refunded to my

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brother the whole of the purchase-money and costs and expenses which he has paid or incurred for the purchase of the said premises 213, King's Road . . . . Chelsea, and the alterations and upkeep of the same ; but I have never been and am not under any obligation to do so, and, as I did not in fact reside and had no intention of residing in the United Kingdom, I was perfectly satisfied and have always believed and still believe and am advised that I did not as the result of the purchase and acquisition of the said house by my brother, and by since occasionally residing therein as his guest for temporary purposes only and for short periods which together with my visits elsewhere in the United Kingdom have never amounted in the aggregate to as much as six months in one year, become subject to or liable to make any return or be assessed for income tax in the United Kingdom up to the present time . . . . "

Oct. 19, 20, 24, 1916. *Sir George Cave, S.-G.*, and *T. H. Parr*, for the surveyor of taxes, and *Bremner*, for the Commissioners, showed cause. The writ of prohibition is not in all cases of excess of jurisdiction a writ to which an applicant is entitled as of right. Where the excess of jurisdiction is not apparent on the face of the proceedings the writ is discretionary, and the applicant may forfeit his right to the writ if he has been guilty of misconduct : *Farquharson* v. *Morgan*, per Lopes L.J. (1) The Court has an inherent power to see that its process is not abused : *Metropolitan Bank* v. *Pooley*, per Lord Blackburn. (2) The affidavit on which the rule nisi in the present case was obtained was so drawn as to mislead the Court, and, apart from the question whether if the true facts had been stated the Court would have granted a rule nisi, the rule having been obtained by means of a misleading affidavit ought to be discharged to prevent an abuse of the process. [*Bullivant* v. *Attorney-General for Victoria* (3) was also cited.]

Disturnal, K.C., and *Edwardes Jones*, in support of the rule. A foreigner domiciled abroad whose income is derived from foreign possessions and who is really and substantially resident abroad is under no obligation, legal or moral, to incur liability to the British

(1) [1894] 1 Q. B. 552, 559. (2) (1885) 10 App. Cas. 210, 220.
(3) [1901] A. C. 196.

Exchequer. He is entitled to preserve his immunity. If he becomes resident in the United Kingdom he no doubt becomes liable; but he is not bound to become resident. Residence within the meaning of the Income Tax Acts is largely a matter of law; in so far as it is a question of fact the intention of the party charged is a very important element. All the facts in this case are now before the Court. The last thing the applicant intended was to become, and she has taken legal advice to avoid becoming, a resident within the meaning of these Acts. When, following the course indicated by her advisers, she states that the house is her brother's, that she has been his guest, and that she never was resident within the United Kingdom since 1887, she states what she is advised and what she believes is the truth. In these circumstances she is not to be charged with deceiving or misleading the Court. When the merits are considered it will be seen that the Kensington Commissioners were not the proper authority to make this additional assessment.

VISCOUNT READING C.J. The applicant, the Princess Edmond de Polignac, obtained from this Court a rule nisi for a prohibition to the General Commissioners for the purposes of the Income Tax Acts for the district of Kensington to prohibit them from further proceeding upon an assessment made upon her for the year ending April 5, 1913. The assessment was in respect of profits from foreign possessions and was made under the provisions of s. 2, Sched. D, of the Income Tax Act, 1853, and s. 106 of the Act of 1842. The answer of the Commissioners is that the applicant was residing in the United Kingdom and had received profits from foreign possessions during the year of assessment and therefore was liable to pay income tax on those profits. In support of her application to the Court to prohibit further proceedings on this assessment the applicant made an affidavit which requires careful consideration.

Before I proceed to deal with the facts I desire to say this: Where an ex parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any

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further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit.

The assessment was made upon the applicant in respect of residence at a house 213, King's Road, Chelsea ; it was based on her being the owner of the house and actually residing in the house. Her affidavit in support of the rule nisi states in substance that she had never since the year 1887 been in the United Kingdom with a view or intention of establishing her residence there ; neither had she ever resided there for a period of six months in any one year. That statement is made to meet the effect of s. 39 of the Income Tax Act, 1842. The affidavit proceeds to state in paragraph 3 that the notice of assessment was forwarded to her in Paris " from 213, King's Road, Chelsea, which is a house belonging to my brother, Mr. W. M. G. Singer." In paragraph 4 she deals with the time during which she was in this country, and states that for part of the time she was staying " at my brother's house, 213, King's Road, Chelsea," and that she also stayed there at other times, " generally in company with other guests of my brother " ; that is to say that this house, which was supposed by the Commissioners to be her residence, was not her house but her brother's, and that she only stayed there as a guest. If that was so she would be justified in saying that such a residence was not sufficient to render her liable to income tax. It was therefore a most material statement ; in short, the assessment on which the Commissioners claim the right to charge her with income tax rests on the basis that she was residing in the United Kingdom within the meaning of these Acts. If she established that she was not resident there during the material time she made out a complete answer. That was what she sought to do by this affidavit.

She stated that she was never resident in person, but was only the guest of her brother. I have no hesitation in saying, having regard to her own affidavit filed in reply, that that statement is untrue: she was not the guest of her brother; the house was not her brother's; in the circumstances it is impossible to believe that she was the guest of her brother. The taxing authorities received information from one who knew the true facts concerning this house in Chelsea. The true facts ascertained from documents are that some years before the year ending on April 5, 1913, the applicant wished to have a house in London with a view of residing there instead of going to hotels or staying with friends, but that she became aware that if she took a house she would become liable to taxation, and to that she objected. It has been said that she was entitled to use all legitimate means to escape taxation; but misleading methods designed to conceal the truth are not legitimate means of escape. She took the opinion of counsel, who quite properly advised her that if she was merely a guest in her brother's house she would not be liable. Upon that advice was built up this arrangement with her brother by which he was to become the nominal purchaser and the rated occupier of the house, and her name was not to appear, but she was to pay to him, and did pay to him, all the moneys he paid for the furniture, servants, and general expenses of the house. He was merely her nominee. In fact nothing more could have been done to make the house her house short of an open acknowledgment of ownership and occupation. In these circumstances the Commissioners might well infer that at the critical time she was residing in the United Kingdom and, having received income from foreign possessions, was liable to pay income tax. These are the true facts of the case. Any doubt on the matter is dispelled by the circumstances of the telephone agreement, the letter of August 19, 1914, relating thereto, and the letter of July 25, 1912.

It is said that the applicant had no intention to deceive, first, because she stated the true facts in her second affidavit, and, secondly, because her conclusion from those facts, however mistaken, was one which she really drew. As to the first contention, I am not impressed by a full disclosure deferred until the deponent's initial statement has been shown to be untrue. A full disclosure is more

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effective before than it is after the witness has been discredited. As to the second contention, with every desire to accept an innocent explanation, I cannot regard as satisfactory that which is offered in paragraph 6 of the affidavit in reply. It sets forth matters from which I conclude that the house was hers. I cannot regard the inquiries which were made of one of the Commissioners as notice to the department of the facts which we now know.

The result is that the Court was deceived by the affidavit filed in support of the application for the rule nisi, and I have come to the conclusion that this is one of those cases in which this Court ought without further discussion of the merits to refuse to make absolute a rule obtained in the way I have stated. The rule nisi must therefore be discharged.

RIDLEY J. I agree and have nothing to add.

LOW J. I entirely agree and only wish to add a few words upon one point. There may be cases where this Court is asked to prohibit the proceedings of inferior Courts and where the want of jurisdiction in the inferior Court is so apparent that this Court would be bound to interfere in whatever circumstances the rule nisi was obtained. If the want of jurisdiction was sufficiently apparent the Court would be compelled to act and could not withhold relief. But the present case does not fall within that class. Here the question of the jurisdiction of the Commissioners is one of doubt and difficulty and one which requires an honest and candid statement of the facts. The statements made in the affidavit on which the rule nisi was granted were very far from being honest and candid. That being so, it seems to me that this Court, having been exposed to an attempt to mislead and deceive it, has no alternative but to discharge the rule.

Rule discharged.

W. H. G.

The applicant appealed.

Dec. 7, 8, 1916. *Hughes, K.C., Disturnal, K.C.,* and *Edwardes Jones,* for the appellant. It is submitted that the affidavit of the appellant on which the rule nisi was granted was a perfectly proper

one and that the Divisional Court were not in any way misled by it in granting the rule. [They repeated the arguments used in the Court below as to the sufficiency of the affidavit and as to the bona fide belief of the appellant in the truth of the statements therein contained.]

[LORD COZENS-HARDY M.R. referred to *Drummond* v. *Collins*. (1)]

It is submitted that the Divisional Court were wrong in discharging the rule without going into the merits. On an ex parte application for an order the applicant is bound to state all the material facts. He has to form an opinion as to what facts are material and is responsible for his statement of them. He will not, however, be deprived of his rights if he comes to a wrong conclusion as to what facts are material.

[SCRUTTON L.J. referred to *Attorney-General* v. *Liverpool Corporation*. (2)

WARRINGTON L.J. The Court will not allow a plaintiff to obtain any advantage from an ex parte injunction which he has improperly obtained.]

The proper course to be followed in such a case is that shown by *Boyce* v. *Gill*. (3) The Court is bound to grant a prohibition in a proper case even at the instance of a third party. There is a great distinction between a rule nisi for a prohibition and an ex parte injunction in the Chancery Division. The latter operates at once, but a rule nisi is nothing more than a summons to the respondent to attend on a certain day to show cause why the order sought should not be made. The respondents here might have moved to discharge the order. They did not do so, but proceeded to file evidence on the merits, and it is now too late for the Court, when the whole of the facts are before it, to refuse to deal with the matter on the merits.

[SCRUTTON L.J. referred to *The Hagen* (4) and *Republic of Peru* v. *Dreyfus Brothers & Co.* (5)

LORD COZENS-HARDY M.R. referred to *Dalglish* v. *Jarvie*. (6)]

A civil Court has no jurisdiction to punish a person for misconduct

(1) [1915] A. C. 1011.
(2) (1835) 1 My. & Cr. 171, 210.
(3) (1891) 64 L. T. 824.
(4) [1908] P. 189, 201.
(5) 55 L. T. 802, 803.
(6) 2 Mac. & G. 231.

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by depriving him of his civil rights. The effect of discharging the rule in the present case will be to deprive the appellant of the right to contest subsequently her liability to be assessed to income tax, as according to the practice of the Crown Office there can be no second application for a writ of prohibition except where there has been some obvious technical mistake committed.

Further, it appears on the face of the assessment itself that the Kensington Commissioners had no power to make this assessment. In a case of prohibition, when once the excess of jurisdiction is pointed out the Court has no option but to grant a writ of prohibition. The assessment is made in 1916 in respect of the financial year 1912-13, and is made by virtue of s. 5 of the Finance Act, 1912 (2 & 3 Geo. 5, c. 8) (1), and accordingly the only persons competent to make the assessment were the Commissioners for the City of London: *Kensington Income Tax Commissioners* v. *Aramayo*. (2) The assessment by the Kensington Commissioners in 1916 is therefore beyond their jurisdiction unless they were empowered to make it by virtue of s. 32 of the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89). (3) That section repealed s. 108 of the Income Tax Act,

(1) Finance Act, 1912, s. 5: "(1.) Income tax for the year beginning the sixth day of April nineteen hundred and twelve shall be charged at the rate of one shilling and twopence, and the same super-tax shall be charged, levied, and paid for that year as was charged for the year beginning on the sixth day of April nineteen hundred and eleven.

"(2.) All such enactments relating to income tax (including super-tax) as were in force with respect to duties of income tax granted for the year beginning on the sixth day of April nineteen hundred and eleven shall have full force and effect with respect to any duties of income tax hereby granted."

(2) [1916] 1 A. C. 215.

(3) Finance (No. 2) Act, 1915, s. 32: "(1.) Notwithstanding anything in section one hundred and six and one hundred and forty-six of the Income Tax Act, 1842, or in any other enactment relating to income tax, a person may be charged to income tax under Schedule D. or E., whether or not he is engaged in any trade, manufacture, adventure, or concern, or any employment, vocation, or office, by commissioners acting for any parish or place in which that person ordinarily resides; and if any person has been so charged before the commencement of this Act, the charge shall not be deemed invalid by reason of that person not having been charged by the right commissioners:

"Provided that nothing in this section shall affect the operation of section one hundred and seventy-one of the Income Tax

1842, which made provision as to the place at which persons were to be assessed to income tax in respect of profits or gains arising from foreign and colonial possessions or securities. Sect. 32 only enables the Kensington Commissioners to assess income tax in respect of the current year and does not apply to previous years: see s. 37. It did not enable them in 1916 to assess to income tax on foreign securities a person who was not then ordinarily residing in Kensington in respect of the financial year 1912–13. Here the appellant left this country in November, 1914, and has not resided in the house in question since.

It is not necessary to send the matter back to the Divisional Court, but the Court of Appeal can deal with it themselves. [They also referred to *Turnbull* v. *Foster* (1), *Farquharson* v. *Morgan* (2), *Rex* v. *Southampton Income Tax Commissioners* (3), and Taxes Management Act, 1880, s. 52.]

Sir George Cave, S.-G., and *T. H. Parr*, for the surveyor of taxes.

[LORD COZENS-HARDY M.R. We wish to hear you on one point. It is said that there is a defect of jurisdiction appearing on the face of the record.]

Sect. 108 of the Act of 1842 is now repealed, and the effect is that s. 106 and the Act of 1880 now remain. The assessment on the appellant was made after s. 32 of the Act of 1915 came into operation. The first limb of s. 106 therefore applied. "Additional first assessment" in s. 52 of the Act of 1880 must mean additional first assessment of the property and not the person. It is the additional first assessment list for Kensington, and no one can remedy the omission except the Kensington Commissioners.

[They were stopped.]

Bremner, for the Commissioners.

Act, 1842, with respect to double assessments.

"(2.) Section one hundred and eight of the Income Tax Act, 1842 (which makes provision as to the place at which persons are to be assessed to income tax in respect of profits or gains arising from foreign and colonial possessions or securities) is hereby repealed."

Sect. 37: "Any amendments made by this Part of this Act with respect to income tax shall have effect as respects the tax for the current income tax year except where the context otherwise requires."

(1) (1904) 6 Tax Cas. 206.

(2) [1894] 1 Q. B. 552.

(3) Ante, p. 259.

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Edwardes Jones in reply. The Solicitor-General has not met the point. It is said that s. 106 operates, but the additional Commissioners had no powers under that section, otherwise *Kensington Income Tax Commissioners* v. *Aramayo* (1) would have been decided the other way.

LORD COZENS-HARDY M.R. This is an appeal against a refusal of the Divisional Court to grant a writ of prohibition. It is a curious case, and in some respects an important one. It raises one very important point of principle upon which I think it is desirable that I should express emphatically my agreement with the Divisional Court. A rule nisi was applied for and obtained for a prohibition. It was supported by and founded on an affidavit. That affidavit contained statements which I quite agree with the Lord Chief Justice were inaccurate to the knowledge of the lady, the deponent, and I think almost manifestly intended to conceal from the Court certain facts which were not only relevant, but I will go further and say essential, to the decision of the matter which came before them. Now the lady says in that affidavit that she was a French subject; that she had had two husbands; that they were both Frenchmen; that she was a widow; that her ordinary residence was in Paris; and that she sometimes resided in Venice, where she had a house. Then she says "I have on many occasions been in the United Kingdom for temporary purposes, but I have never been there since my first marriage in the year 1887 with the view or intention of establishing my residence therein, nor have I ever resided in the United Kingdom at one time or several times for a period equalling, in the whole, six months in any one year."

Those are words taken from s. 39 of the Income Tax Act, 1842, Then she says that she was in the United Kingdom for temporary purposes during the year ending April 5, 1913, and during the year ending April 5, 1914, when she stayed at various private houses with friends, and also at certain hotels, and that "On none of those occasions was I in the United Kingdom with any view or intention of establishing my residence therein. Since the month of November, 1914, I have not been in the United Kingdom." Now what were the facts? The facts admitted by her in an affidavit in reply,

(1) [1916] 1 A. C. 215.

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as proved to demonstration by the actual documents in this case, are these: The lady saw a house which she was much pleased with, a house No. 213, King's Road, Chelsea, which belonged to a friend of hers. She liked the house. There was a good deal of correspondence between the vendor and herself. There was an opinion taken by her from counsel, who gave her what I think was exceedingly good advice. She was afraid that she might expose herself to the liability to income tax on all or part of her property if she resided in this country. First of all it was proposed that the house should be bought by her brother with her money. Counsel said that would not do. Then some hint was given and it was suggested that if she stayed as a guest in a house in England she would not be residing in that house within the meaning of the Act. Ultimately—not, I think, under the advice of counsel at all—an arrangement was made, which she does not admit in her evidence, but which I cannot bring myself for one moment to doubt was proved to demonstration, under which the lease of the house was to be purchased by her brother nominally, I think, for 3000*l.*, and her own furniture, for which, I think, she paid 1000*l.*, was to be put into the house; and then this happens: For a number of years she lives or resides there—I want to find a neutral word for the moment. She was there occasionally. But this is proved to demonstration: the purchase-money, 3000*l.*, was found by her and paid to her brother; all the household expenditure, the weekly bills, rates, taxes, and everything of that kind, were paid by whom? By the lady, and not by her brother. When the time came and the house was let for a period the benefit of the rents which the tenant paid did not go into the brother's pocket, but went into the sister's pocket. I say that because we have had the solicitor's account against the brother here, and it is quite apparent that, with an exception which is perfectly trifling and unimportant, every penny of the purchase-money, the expenses, the outgoings, from the date of the purchase to the end of the account, has been borne by the lady. Then the lady said in her affidavit in reply that the arrangement she made with her brother was that she should be there as a guest in his house; that is, she was to be a guest in a house which had been paid for by herself, which was kept up by her, and in which her furniture, which I suppose was valuable furniture, had

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been placed. To say that in those circumstances the arrangement was that she should be there as a guest of her brother is something which is beyond my credulity. It is a new use of the term "paying guest," of which we sometimes hear, so to apply it. Was that a material matter to be brought before the Court? It is not necessary for me to decide, and I do not propose to decide, whether the evidence sufficed to prove that she was a resident there or not, but it was a matter which was material for the consideration of the Court, whatever view the Court might have taken. It is a case in which it seems to me there was plainly a suppression of what was material, and we cannot be too strict in regard to that which to the best of my belief has been a long established rule of the Court in applications of this nature and has been recognized as the rule. The authorities in the books are so strong and so numerous that I only propose to mention one which has been referred to here, a case of high authority, *Dalglish* v. *Jarvie* (1), which was decided by Lord Langdale and Rolfe B. The head-note, which I think states the rule quite accurately, is this: "It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward." Then there is an observation in the course of the argument by Lord Langdale: "It is quite clear that every fact must be stated, or, even if there is evidence enough to sustain the injunction, it will be dissolved." That is to say he would not decide upon the merits, but said that if an applicant does not act with uberrima fides and put every material fact before the Court it will not grant him an injunction, even though there might be facts upon which the injunction might be granted, but that he must come again on a fresh application. Then there is a passage in Lord Langdale's judgment (2) which is referred to in the head-note. It is this: "There is, therefore, a question of law, whether having regard to the facts thus appearing, the plaintiffs are entitled to the protection they ask; and there is also a question of practice, whether the facts stated in the answer being material to the determination of the question, and being within the knowledge of the plaintiffs by whom the case was brought

(1) 2 Mac. & G. 231, 238. (2) 2 Mac. & G. 241, 243.

forward, and who obtained an ex parte injunction upon their own statement, whether the omission of the statement of these facts in the bill does not constitute a reason why the ex parte injunction so obtained should be dissolved." They held that the injunction ought not to be granted although there might be materials apart from this question upon which the injunction might have been granted. Rolfe B. says this : " I have nothing to add to what Lord Langdale has said upon the general merits of the case ; but upon one point it seems to me proper to add thus much, namely, that the application for a special injunction is very much governed by the same principles which govern insurances, matters which are said to require the utmost degree of good faith, ' uberrima fides.' In cases of insurance a party is required not only to state all matters within his knowledge, which he believes to be material to the question of the insurance, but all which in point of fact are so. If he conceals anything that he knows to be material it is a fraud ; but, besides that, if he conceals anything that may influence the rate of premium which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy. So here, if the party applying for a special injunction, abstains from stating facts which the Court thinks are most material to enable it to form its judgment, he disentitles himself to that relief which he asks the Court to grant. I think, therefore, that the injunction must fall to the ground." That is merely one and perhaps rather a weighty authority in favour of the general propositionwhich I think has been established, that on an ex parte application uberrima fides is required, and unless that can be established, if there is anything like deception practised on the Court, the Court ought not to go into the merits of the case, but simply say " We will not listen to your application because of what you have done."

Then it is said that that rule may be true in cases of injunctions where there is an immediate order granted, which order can be discharged, but that it has no reference at all to a case like a rule nisi for a writ of prohibition, which is nothing more than a notice to the other side that they may attend and explain the matters to the Court. To so hold would, I think, be to narrow the general rule, which is certainly not limited to cases where an injunction has been

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granted. It has been applied by this Court, and certainly by the Courts below, to an application for leave to serve a writ out of the jurisdiction. If you make a statement which is false or conceal something which is relevant from the Court, the Court will discharge the order and say "You can come again if you like, but we will discharge this order, and we will apply the general rule of the Court to applications like this." There are many cases in which the same principle would apply. Then it is said "That is so unfair; you are depriving us of our right to a prohibition on the ground of concealment or misstatement in the affidavit." The answer is that the prerogative writ is not a matter of course. The applicant must come in the manner prescribed and must be perfectly frank and open with the Court.

It follows from what I have said, unless there is something in another point to which I will refer, that the Lord Chief Justice was justified in saying that the application must be refused, not on the grounds of the merits of the case, but on the ground that the rule nisi was obtained by concealment of facts which ought not to have been concealed and by statements which were not in accordance with the facts.

Then it is said that it would be very hard upon the applicant to dismiss the application because, according to the settled practice, or what is believed to be the settled practice, of the Crown Office, there cannot be a second application for a writ of prohibition except in the case of a purely formal defect, such as a mistake in the jurat of the affidavit or something of that kind, and that in such a case only would the Court treat the first application as no obstacle in the way of the second. All I can say is that if that is the rule of the Crown Office it is a rule which is perfectly well settled, and anybody who goes to the Crown Office must take the consequences of that rule. We cannot, and we ought not, to refuse to give effect to what seems to me to be a most salutary rule of practice merely because it may prevent this lady from ever getting what she seeks; it may or may not. I do not say whether it will or will not.

Then it is said—and this was an ingenious argument—there is on the record itself sufficient to show that there was no jurisdiction here, and that that being so, the objection to jurisdiction being patent and not latent and not dependent upon evidence, the Court

ought to grant the prohibition. Now that is a very subtle argument. It amounts to this: the papers which were before the Court and which are part of the record contained the assessment, what is called the additional first assessment, for the parish of Kensington. It is made by additional Commissioners of Income Tax for Kensington, in which parish it is admitted that this house was to be found, and it says "We, the undersigned additional Commissioners, acting in the district of Kensington, do hereby certify the foregoing additional first assessments of duties payable under statute"; and then when we look at the body of the document we see that it is an additional first assessment for duty under Sched. D for the year, amongst others, 1912–13. It is said that in 1912–13 the Kensington Commissioners had no jurisdiction at all to make this assessment. That is quite true; they had not. It is said the only persons who could then have assessed the lady for profits from foreign possessions were the Commissioners for the City of London, and therefore it is obvious that was a case in which it appears upon the record that the person who could not have made the original first assessment cannot be in a better position to make the second assessment. That seems to me to be a complete fallacy. We are not now in 1912–13, we are in 1916, and in December of last year an Act came into operation, the Finance (No. 2) Act, 1915, which did several things. It did them possibly in rather a clumsy way, but it did them. By s. 32, sub-s. 2, it repealed s. 108 of the Income Tax Act, 1842, under which this assessment could only have been made by the City of London Commissioners. That is the interpretation put upon the section by the decision of the House of Lords in *Kensington Income Tax Commissioners* v. *Aramayo*. (1) Not only did it repeal that s. 108, but the effect was that it left the case of profits from foreign possessions falling under s. 106 of the Income Tax Act, 1842, s. 108 being an exception from s. 106, so that when s. 108 was repealed the case went back under s. 106. That is effected by s. 32, sub-s. 1, of the Finance (No. 2) Act, 1915, which provides: [His Lordship read the sub-section and continued:]

In a case recently before this Court of *Rex* v. *Southampton Income Tax Commissioners, Ex parte W. M. Singer* (2), in which a brother of this lady was concerned, we decided that the retrospective action

(1) [1916] 1 A. C. 215. (2) Ante, p. 259.

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of s. 32 did not apply, because the applicant had not been "charged" before the commencement of the Act—that on those words that part of the section meant charged so as to create a Crown debt—that is effectively charged. But we certainly did not decide, and, speaking for myself, I did not intend to decide, that the only effect of that section was to deal with the additional Commissioners. We only did not apply it to what I call the first preliminary step. There is nothing in s. 32 to justify the contention that s. 37 of the Act taken with s. 32 shows that there was no jurisdiction. Sect. 37 of the Act of 1915 has been read in a most extraordinary way. It is as follows: "Any amendments made by this Part of this Act with respect to income tax"—that applies to s. 32—"shall have effect as respects the tax for the current income tax year except where the context otherwise requires." It seems to me there is no ground whatever for saying that s. 32 is only applicable to income tax for the current year. No such limitation is to be found in the language of that section. There might have been a doubt as to whether it was applicable to the current year or not, but that was made quite clear by s. 37.

For these reasons I think that the view taken by the Divisional Court was perfectly right. The Court, for its own protection, is entitled to say "We refuse this writ of prohibition without going into the merits of the case on the ground of the conduct of the applicant in bringing the case before us."

For these reasons I think the appeal fails and must be dismissed with costs.

WARRINGTON L.J. This is an appeal from an order of the Divisional Court dated October 24, 1916, by which it was ordered that the order dated May 16 last that "the General Commissioners for the purposes of the Income Tax Acts acting for the district of Kensington in the county of Middlesex should show cause why a writ of prohibition should not be awarded to prohibit them from making, allowing, confirming, enforcing, or otherwise proceeding upon a certain assessment be now discharged and that costs be paid by the applicant." The question we have to determine is whether the Court was justified in discharging that order, not because on the merits the Court came to the conclusion that the case was not

one in which a writ of prohibition ought to issue, but because the order itself was improperly obtained.

Now the rule nisi or the order which was discharged is an essential preliminary to the issue of the writ of prohibition. If there is a defect in that essential preliminary step such as that it ought to be treated as if it had not been taken, then the writ of prohibition cannot be granted, because the essential preliminary to its issue does not exist. In the present case is there such a defect in this order as that the Court ought to order it to be discharged—that is to say, to be as if it had not been made? It is perfectly well settled that a person who makes an ex parte application to the Court—that is to say, in the absence of the person who will be affected by that which the Court is asked to do—is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it. Did the applicant in the present case make that full disclosure? The question arises in this way: The applicant makes the present application in her own pecuniary interest with a view of preventing herself being charged with income tax in respect of her income, and particularly in the present application income received from foreign possessions. The point upon which her liability turns is whether she is resident in the United Kingdom. In support of her application she filed an affidavit in which she stated quite truly that she was a French subject domiciled in France. She then stated that she was not and never had been a resident in the United Kingdom. She stated that she resided and had for many years past resided in Paris, and occasionally at Venice. And then she stated that she had paid visits to various other places on the Continent and in the United Kingdom from time to time, when she stayed at hotels or at the houses of relatives or friends. I will pass over the third paragraph of the affidavit, which deals with rather different matters. She then proceeds in the fourth paragraph to condescend on details of her visits to England during the income tax year 1912-13 and she states that during the year in question she was

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in the United Kingdom for temporary purposes on visits for sixty-eight days in all, which she mentions. She paid several visits, and the greater part of the time she spent with her friend Lady Colebrooke, and she paid other visits of a few days' duration to other friends at their country houses. Then comes this: "I spent a few days in London . . . . staying at my brother's house, 213, King's Road, Chelsea, and I also stayed at other times during this period for not exceeding four days each and not exceeding twenty days altogether, and generally in company with other guests of my brother." The point of that is that she puts her stay at No. 213, King's Road, Chelsea, on the same footing as what she has described in other passages as "visits to relatives and friends," and in particular to such a friend as Lady Colebrooke. Then she deals with the next year, and she refers to her stay in the United Kingdom as visits to, amongst other places, this house No. 213, King's Road, and she says "On none of these occasions was I in the United Kingdom with any view or intention of establishing my residence there." Then finally she says "I am not and never have been since 1887 resident within the United Kingdom." Now was that a fair disclosure of the actual facts, or rather of the material facts? It is untrue, as is shown partly by the evidence that the Crown have succeeded in obtaining and partly by the disclosure that she was compelled to make by the filing of the Crown's affidavits. The true fact is this, putting it as shortly as may be: In 1908 she saw a furnished house which she thought would be a very good house for her to have in London as a *pied à terre* instead of going to friends' houses or to hotels during such time as she wished to be in London. She took a fancy to the house and was desirous of buying it, and the vendor was desirous of selling it, but she was warned that she might incur liability to English income tax if she had a house in England. She therefore thought that she would—I will not use the word "evade," though it is a very good word—but thought she would prevent herself from becoming liable to income tax if she adopted the plan of allowing the house to be bought in her brother's name, treating herself when there as her brother's guest. What was actually done? The house was bought in her brother's name; she paid the whole of the purchase-money; she paid all the rates payable in respect of the house, the ground rent and the insurance

and what seems to me much more important than that, she paid for the upkeep of the house, the wages of the servants, the provisions necessary for their maintenance, and, when she was living in the house, the provisions necessary for the maintenance of herself and any other guests who might be staying there, and whenever any alterations were to be made in the house it was she and not her brother who was regarded as the person whose voice was to prevail as to whether alterations were to be made or not and what they were to be, and the whole of the furniture in the house belonged to herself. The house for some time has been let furnished, and we find that the rent paid by the tenant is credited in the solicitors' account exactly in the same way as her own payments were credited during the time when the house was occupied in the way that I have just stated. It cannot, I think, possibly be said that, the question which the Court would have to determine on the merits of the case being whether or not this lady could be treated in respect of this house as being resident in England, it was not material that the Court should be informed of the facts which I have mentioned when the rule nisi was applied for. It seems to me that by making the application as she did and by suppressing the facts which were really material the lady has brought herself within the rule to which I have already referred, and that the order under which alone the income tax officials could be brought to answer the case which she has made ought to have been discharged, and that the Court was quite right in discharging it. If that order is discharged there are no proceedings before the Court, and there is nothing for the Commissioners to answer.

Then it is said that there is a distinction in matters of prohibition between a case in which the defect of jurisdiction appears on the face of the proceedings and a case in which the defect is raised by the evidence of the party applying for the prohibition. As it is put in one of the cases, there is a distinction between a case of a patent defect and a case of a latent defect, and it is said that in the one case the Court is bound to grant the writ of prohibition whatever may have been the conduct of the person putting the Crown in motion to obtain it, but that in the other case the matter is in the discretion of the Court, and it will grant or withhold the writ according to its view of the merits of the parties. It is contended

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further that this is one of the first class of cases, that this is a case in which it was patent on the face of the proceedings that there was a defect of jurisdiction. Now the only document, independent of evidence, on which it can be said that the defect appeared was the additional assessment itself dated March 30, 1916. What appeared by that was that the Commissioners for Kensington had on March 30, 1916, made an additional assessment in respect of profits from foreign possessions for the year 1912-13. That is all that is patent upon the proceedings. What is further not patent upon the face of the proceedings but a matter of law is that in the tax year 1912-13 the Commissioners for Kensington could not have made an assessment in respect of profits from foreign possessions, and it is said that that shows a defect of jurisdiction. In my judgment that is founded on an entire misapprehension of the meaning of s. 52 of the Taxes Management Act, 1880, under which these additional assessments are made. The argument, putting it shortly, is that the additional assessment can only be made by the Commissioners who have made the original assessment, and that they can only include in the additional assessment persons who are omitted from or who were liable to be inserted in the original assessment. There is no foundation whatsoever for that limitation of s. 52 of the Act of 1880. The Act of 1880 enables the additional Commissioners to make an additional assessment if the surveyor discovers that "any properties or profits chargeable to the duties"—that is, to income tax duties—have been omitted from the first assessment, or that "any person so chargeable"—that is, chargeable to the duties—has not made a full and proper or any return and has not been charged to the said duties. The additional Commissioners in the present case, as appears on the face of the assessment, purport to have discovered that the present applicant, a person chargeable to duties, has not been so charged, and they accordingly make an additional assessment, and they make that assessment at a time when by virtue of the Finance (No. 2) Act, 1915, they were the proper Commissioners to make it. The defect, if there is a defect, arises not on the face of the proceedings but from proof which the applicant says she could have adduced that she was not a person ordinarily resident in the district, and for that reason a person not liable to be assessed by these Commissioners. But that

is not a defect apparent on the face of the proceedings, and in my opinion, therefore, that contention also fails.

On the whole I think that the only proper order which the King's Bench could properly make was an order discharging the order improperly obtained. They have made that order, and I think that the appeal ought to be dismissed.

SCRUTTON L.J. I am of the same opinion, and as in my view the principle on which the Divisional Court decided this case which we are affirming is one of vital importance to the practice of the Court, I desire to state the reasons for my judgment in my own words. The Princesse de Polignac, an American lady who had married a French subject, was on March 30, 1916, assessed by the additional Commissioners for the parish of Kensington in respect of the annual profits or gains accruing to a person residing in the United Kingdom, the particular nature of the property being income derived from foreign possessions. She thereupon applied to the Divisional Court—the Court of King's Bench—for a writ of prohibition addressed to the Commissioners prohibiting them from proceeding on the assessment on the grounds which are expressed in the order which was granted on the rule nisi on the original application—first, that she was not resident in the United Kingdom within Sched. D; secondly, that the assessment had been made more than three years after the end of the assessment; and, thirdly, as the objection was originally stated,—a double-barrelled objection—that the Commissioners could not assess her because she was not ordinarily resident at the time they assessed her in their parish or district, and that there was no jurisdiction in them because in the year of assessment, 1912-13, they could not have assessed her. I am a little startled to find the grounds in the order giving a day drawn up in a different way from those in the affidavit. It appears in this case—I do not know whether it is so in other cases—that the Crown Office has practically allowed the counsel for the applicant to draw up the order; and in this case undoubtedly, both on head 1 and on head 3, the ground has been drawn up in quite a different way from that which is stated in the affidavit before the Court. That seems to me to be a very undesirable practice, and one which should not be followed in future. Now that

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rule giving a day to the Commissioners to show cause was obtained upon an ex parte application ; and it has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts—facts, not law. He must not misstate the law if he can help it—the Court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside any action which it has taken on the faith of the imperfect statement. This rule applies in various classes of procedure. One of the commonest cases is an ex parte injunction obtained either in the Chancery or the King's Bench Division. I find in 1849 Wigram V.-C. in the case of *Castelli* v. *Cook* (1) stating the rule in this way : " A plaintiff applying ex parte comes (as it has been expressed) under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that, and the Court finds, when the other party applies to dissolve the injunction, that any material fact has been suppressed or not properly brought forward, the plaintiff is told that the Court will not decide on the merits, and that, as he has broken faith with the Court, the injunction must go." The same thing is said in the case to which the Master of the Rolls has referred of *Dalglish* v. *Jarvie.* (2) A similar point arises in applications made ex parte to serve writs out of the jurisdiction, and I find in the case of *Republic of Peru* v. *Dreyfus Brothers & Co.* (3) Kay J. stating the law in this way : " I have always maintained, and I think it most important to maintain most strictly, the rule that, in ex parte applications to this Court, the utmost good faith must be observed. If there is an important misstatement, speaking for myself, I have never hesitated, and never shall hesitate until the rule is altered, to discharge the order at once, so as to impress upon all persons who are suitors in this Court the importance of dealing in good faith with the Court when ex parte applications are made." A similar statement in a similar class of case is made by Farwell L.J. in the case of

(1) (1849) 7 Hare, 89, 94. (2) 2 Mac. & G. 231.
(3) 55 L. T. 802, 803.

The Hagen (1): "Inasmuch as the application is made ex parte, full and fair disclosure is necessary, as in all ex parte applications, and a failure to make such full and fair disclosure would justify the Court in discharging the order, even although the party might afterwards be in a position to make another application."

Now what happened in this case? The lady swore an affidavit which I have not the slightest doubt was settled by her legal advisers. She swore that she was not a resident in the United Kingdom; she swore that she occasionally stayed at 213, King's Road, Chelsea, "which is a house belonging to my brother, Mr. W. M. G. Singer"; she swore with regard to staying at her brother's house, "I also stayed there at other times during this period, generally in company with other guests of my brother," and there she stopped. We now know the facts. We know them partly because a discharged clerk from the office of her solicitors, conceiving himself aggrieved, thought the right way to redress his grievance was to go straight to the Income Tax Commissioners with a number of copies of letters which he had seen in the course of his employ; and, secondly, we know the facts because, when the Income Tax Commissioners put forward the information that they had obtained from this discharged clerk, the Princess and her legal advisers then overflowed with candour to the Court, and told them a large number of things which they might very well have told them in the first instance. We know now—and I take the lady's words in order not to misrepresent her—that the lady was thinking of buying a house in London: "Another important point is that I at present do not pay income tax on my estate in England, being domiciled in France, but I should lose this advantage by buying a house in London. I feel sure, however, that the property could be paid for in somebody else's name or in some manner which would get over this difficulty." The lady is one of that class of rich foreigners who desire to enjoy the advantage of occasional residence in Britain, but do not desire the disadvantage of contributing to British burdens, and, as appears from that letter, she was anxious to have a house in London where she could stay when she came to London, but was particularly anxious

(1) [1908] P. 189, 201.

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that the house in London should not be a residence within the meaning of the Income Tax Acts. She consulted counsel; he was asked whether it would do if her brother bought the house with her money and made a declaration of trust for her. He was asked whether it would do if the brother bought the house with her money and then mortgaged it to her for the full amount of the purchase-money, with a back letter from her that the money should never be called in. Counsel was unsympathetic, and replied that he did not think either of those ingenious devices would be of any use; and so at last an arrangement was made by which the brother bought the house, the lady providing the purchase-money; the lady provided the furniture, the lady provided every expense in connection with the house, and came and stayed there whenever she wished, and it was hoped that some Court might be found sufficiently credulous to believe that the lady was really the guest of her brother and had no interest in the house, and was not residing in something which was practically her own residence. The best comment, I think, on that is the letter of the lady's solicitors—solicitors who were acting for her brother, and who sometimes acted for the lady—who wrote to the brother: "We send you the account. You will of course know how to deal with the matter according to the private arrangement between yourself and your sister, and we enclose herewith a typed copy of this letter which you may find useful to forward to her." It is not necessary, in my view, for this Court to decide whether the lady resided or not. What is material for the Court to consider is this: were these facts which the applicant did not tell the Court material to be considered on the question whether there was or was not residence? I think it is obvious that any tribunal settling whether this lady resided ought to know these facts. Again, if there was any evidence on which the Commissioners could find residence, the remedy would not be prohibition, but appeal, and before issuing a writ of prohibition the Court should know whether there was any evidence on which the Commissioners could have found residence, though other tribunals might think differently, in order that the Court might know whether the writ of prohibition was the proper remedy, or they should say "We must leave you to your remedy by appeal and case stated if necessary." It seems to me, therefore, without

deciding the question of what would have happened if we had been dealing with the case on the merits, that facts were withheld, and I think, so far as the solicitors were concerned, deliberately withheld, from this Court which would have been material in considering whether the Court should or should not issue a writ of prohibition.

When we have got to this stage, what is to happen? An applicant has obtained from this Court relief in the sense that some one has been called upon to answer her application, and she has obtained it by an ex parte affidavit which suppresses material facts. I take the result from the one sentence that the Master of the Rolls read in the case of *Dalglish* v. *Jarvie* (1), a sentence in the judgment of Rolfe B.: "If the party applying for a special injunction abstains from stating facts which the Court thinks are most material to enable it to form its judgment, he disentitles himself to that relief which he asks the Court to grant." The Court will not on that call upon the Commissioners to answer; it refuses the applicant her day because she has got her day, on which the Commissioners were to answer, by misrepresentation. We do not decide on the merits; the Divisional Court did not decide on the merits on this ground, and I think they were quite right in the decision that they came to.

But it is said that in writs of prohibition, whatever may be the case in other matters, the Court has no option but to grant a writ of prohibition once the excess of jurisdiction is shown. Now the case of *Farquharson* v. *Morgan* (2) shows that, at any rate where the excess of jurisdiction is not patent on the face of the record, the Court itself may have jurisdiction to deal with the matter. The Court distinguished cases where excess of jurisdiction is patent on the face of the record on the ground that there there was a public excess of jurisdiction which might grow into a precedent if not checked, and for that reason they distinguished the cases of patent excess from cases which can only be found by going into the evidence. They had not before them the case where the day to argue the writ of prohibition had been obtained by concealment of material facts; and I am not at all sure that if they had had such

(1) 2 Mac. & G. 231, 244. (2) [1894] 1 Q. B. 552.

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a case before them they would have said that the Court had no remedy, but was bound to grant a writ of prohibition, though the day had been obtained by suppressing material facts. But in my view this case comes nowhere near a case where excess of jurisdiction is obvious on the face of the record. The record states that the lady is resident in Chelsea in the district of Kensington; whether she is or is not really does not appear on the face of the record, and must be ascertained by evidence; and so far, therefore, as the objections taken to the assessment depend on residence, there is no excess of jurisdiction appearing on the face of the record.

But it is said—and I hope I state the contention accurately, though I have had the greatest difficulty in understanding it—that there is a certain excess of jurisdiction appearing on the face of the record. It is said that the record shows that the Commissioners for Kensington in 1916 have assessed in respect of foreign possessions a lady in respect of the year 1912-13. It is said that the Court must know that by the statute in 1912 the Commissioners for Kensington could not have assessed that lady in respect of foreign possessions; and it is further said that the Court must know from the statutes, if I follow it, that nobody could assess that lady as an additional assessment in 1916 unless they could also have assessed her in 1912-13. I am not at all sure that I state it correctly. That contention appears to me to make nonsense of the amending section of the Finance (No. 2) Act, 1915. I do not know that it necessarily follows that because a section of an Income Tax Act appears to make nonsense it is not what was actually passed by the Legislature; but one would prefer, if possible, to construe the section so that it should not make nonsense. Sect. 32 of the Finance (No. 2) Act, 1915, repeals s. 108 of the Income Tax Act, 1842, which made foreign possessions assessable by the Commissioners for London, and provides that a person may be charged to income tax under Sched. D, which includes foreign possessions, by Commissioners acting for any parish or place in which that person ordinarily resides. Now, if I understand the applicant's view of the result of the section, it is that nobody could have assessed this lady for income tax even if she were liable to additional assessment; that the London Commissioners could

not do it because s. 108 was repealed, and that the Kensington Commissioners could not do it because they could not have assessed in 1912. It seems to me that no such absurd result follows from the section that the Commissioners for Kensington, if the lady ordinarily resided there in 1912, cannot make an additional assessment in 1916 for 1912, or that they cannot do so unless she ordinarily resides there in 1916. Therefore on this ground there is no defect appearing on the face of the record, and the Court is left, even if *Farquharson* v. *Morgan* (1) applies to the case of a writ obtained by misrepresentation, with the full jurisdiction it would have in the case of a writ of prohibition for excess not appearing on the face of the record; and the Divisional Court were quite right, therefore, in taking the action they did. I express no final opinion, but it may be that the result of this is that the applicant has no further remedy. In the case of *Reg.* v. *Bodmin Corporation* (2) Day J. said: "As I read the authorities, it has always been held, whenever this objection has been taken, and the attention of the Courts has been called to the point, that no second application for a prerogative writ will be granted when the first application has been discharged. There are many authorities which support this contention; but I think, apart from authority, that it is a most convenient view to take of the jurisdiction of the Court in such matters. It is a view which has commended itself to many judges who have acted upon it, and it commends itself to me. It is no doubt extremely convenient that no second application for a high prerogative writ should be allowed after a first application has been refused. Such a writ is an extraordinary remedy, and persons seeking it may very reasonably be required not to apply for it unless they have sufficient cause for doing so. They must come prepared with full and sufficient materials to support their application, and if those materials are incomplete, I think it is quite right that they should not be allowed to come again."

It may be that the result of our decision is that the applicant loses her remedy. If so, she has only herself and her legal advisers to thank for it.

For these reasons, stated in my own words, in view of the importance of the matter we are dealing with, I concur in the judgment

(1) [1894] 1 Q. B. 552. (2) [1892] 2 Q. B. 21 23.

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of the rest of this Court, that the judgment of the Divisional Court was right, and that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Church, Rendell, Bird & Co.; Solicitor of Inland Revenue.*

W. I. C.

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HUDSON AND ANOTHER *v.* BRAY.

Highway—Obstruction—Tree fallen across Highway—Liability of Occupier of Land to give Warning to Passers-by—Highway Act, 1835 (5 & 6 *Will.* 4, *c.* 50), *ss.* 65, 72.

Where a tree, blown down in a violent gale, has fallen across a highway so as to cause an obstruction thereto, the occupier of the land upon which the tree was growing is under no obligation by virtue of either s. 65 or s. 72 of the Highway Act, 1835, to light the tree or to warn persons passing along the highway of the existence of the obstruction.

APPEAL from the Bishop's Stortford County Court.

The defendant, a farmer, was the tenant of land adjoining a highway. A large elm tree which stood on the defendant's land was blown down on the night of December 27, 1915, during a very violent gale, which, according to the finding of the county court judge, amounted to an act of God. The tree fell across the highway, which at that place was in a cutting, and the top of the tree rested on the bank on the other side of the road. The tree lay 3 feet 2 inches above the road on the side on which it grew, and 5 feet 5 inches above the road on the other side. The defendant knew on the following morning, December 28, at about 10.30, that the tree had been blown down. The road foreman to the Herts County Council saw the defendant at about 2 P.M. and told him that he must get some one to remove it. The defendant sent two men who worked with the road foreman and helped to cut the branches off the tree. As the tree could not be removed during that day—the removal of the tree in fact taking four days—the road foreman told the defendant that a lamp would have to be put upon the tree. According to the

road foreman's evidence the defendant said he would do so, but according to the defendant's evidence he only offered to lend a lamp, as the road foreman had not got one, leaving it to the road foreman to put the light on the tree, as he considered the highway authority had taken charge of the tree. About 4.45 P.M. the road foreman left the place, and the defendant's two men went to the defendant's farm, which was about half a mile away from the fallen tree, to fetch the lamp.

The plaintiffs were driving along the road in a motor car at about 5 P.M. on December 28, it being then quite dark, and the lamp not having at that time been put upon the tree. The lights on the car, in compliance with the lighting regulations, only showed a light upon the road and did not shine upon the fallen tree, with the result that the car ran into the fallen tree, the plaintiffs receiving personal injuries and the car being damaged. The highway authority subsequently stationed men to warn persons passing along the highway, and the men continued there till the tree was removed.

The plaintiffs claimed to recover damages in respect of the personal injuries and the damage to the car, alleging that the defendant had been negligent in failing to remove the tree or to give warning that it was lying across the highway.

The county court judge held that the defendant had been guilty of negligence, inasmuch as for a short time he had not put any one in charge of the tree to warn persons travelling along the highway of the obstruction, although he knew that the tree had fallen across the highway, and that therefore he was liable.

The defendant appealed.

R. W. Turner, for the defendant. An occupier of land adjoining a highway is under no duty to remove an obstruction upon the highway caused by the act of God. The duty of removing an obstruction from a highway is imposed upon the surveyor of highways by s. 26 of the Highway Act, 1835, but no action would lie by a person injured by the obstruction against the surveyor for not removing it. The decision of the county court judge did not proceed upon the ground that the defendant had been negligent in allowing the tree to fall upon the highway, or that there was a duty upon him as the occupier of the land to remove the tree, but

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upon the ground that the defendant had been negligent in failing to light an obstruction which he knew to be on the highway, and in failing to warn persons passing along the highway of the existence of an obstruction. The obligation was based on the knowledge of the defendant of the existence of the obstruction, but although an occupier of land may know of the existence of an obstruction he may nevertheless be quite unable either through physical incapacity or owing to his being many miles away to do anything to remedy it or to warn persons. An occupier of land is not under any obligation either to light an obstruction which he knows to be in the highway or to warn persons passing along the highway of its existence. In order that the plaintiffs may succeed they must show two things, namely, an obstruction on the road by the fault of the defendant and no want of ordinary care to avoid it on their part: *Butterfield* v. *Forrester*. (1) This the plaintiffs failed to do. [He also referred to *Davies* v. *Mann* (2) and *Nichols* v. *Marsland*. (3)]

F. Phillips, for the plaintiffs. The defendant as the occupier of the land upon which the tree was growing was under an obligation under s. 65 of the Highway Act, 1835 (4), to remove the tree from

(1) (1809) 11 East, 60.

(2) (1842) 10 M. & W. 546.

(3) (1875) L. R. 10 Ex. 255.

(4) Highway Act, 1835, s. 65: ". . . . if the surveyor shall think that any carriageway or cartway is prejudiced by the shade of any hedges, or by any trees . . . . growing in or near such hedges or other fences, and that the sun and wind are excluded from such highway, to the damage thereof, or if any obstruction is caused in any carriageway or cartway by any hedge or tree, it shall be lawful for any one justice of the peace, on the application of the said surveyor, to summon the owner of the land on which such hedges or trees are growing next adjoining to such carriageway or cartway to appear before the justices at a special sessions for the highways to shew cause why the said hedges are not cut, pruned, or plashed, or such trees not pruned or lopped, in such manner that the carriageway or cartway shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such carriageway or cartway to the damage thereof, or why the obstruction caused in such carriageway or cartway should not be removed; . . . . and if such justices shall order and direct that such hedges shall be cut, pruned, or plashed, or such trees pruned or lopped, in manner aforesaid, or such obstruction removed, the said owner shall comply therewith within ten days after a copy of such order shall have been left at the usual place of abode of the said owner or of his steward or

the highway after it had been blown down, as it constituted an obstruction to the highway. He sent his men and horses to remove the tree because he would have to bear the cost of removing it and it was more economical for him to do the work himself. It is also clear from the decision in *Gully* v. *Smith* (1) that if the defendant had failed to remove the tree within a reasonable time after having been called upon to do so by the surveyor of highways he would have been guilty of wilfully obstructing the highway within the meaning of s. 72 of the Highway Act. The fact that the falling of the tree was due to the act of God and not to any fault on the defendant's part is immaterial. As the defendant was therefore under an obligation to remove the tree, he was bound to light it and to warn persons passing along the highway of its existence until it was removed so as to prevent it being a trap, and the failure on his part to do so constituted negligence for which he is liable to the plaintiffs.

R. W. Turner, in reply. Sect. 72 of the Highway Act only imposes a penalty for wilful obstruction, and s. 65 merely refers to the lopping of hedges and trees by the side of a road which prevent the access of sun and wind to the road. *Gully* v. *Smith* (1) has no application to the present case.

RIDLEY J. The point in this case, although a small one, is nevertheless one of some difficulty. According to the arguments of Mr. Phillips, for the plaintiffs, the obligations of a tenant farmer would, in my opinion, be increased to a point which would be intolerable. I do not think the Highway Act, 1835, imposes upon a tenant farmer the duty of removing a tree which has fallen across the highway before he has been called upon to do so by the highway surveyor. That Act by s. 72 makes the occupier of land liable for wilful obstruction of the highway if after receiving notice calling upon him to remove an obstruction upon the highway coming from

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agent, and in default thereof shall forfeit, on conviction, a sum not exceeding forty shillings; . . . ."

Sect. 72: ". . . . if any person . . . . shall in any way wilfully obstruct the free passage of any such highway; every person so offending . . . . shall for each and every such offence forfeit and pay any sum not exceeding forty shillings, over and above the damages occasioned thereby."

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his land he fails to do so. Mr. Phillips contended that s. 65 imposed an obligation upon the defendant to remove the obstruction from the highway. The marginal note to that section is "mode of proceeding if highway is prejudiced by hedges, &c." I think that section merely provides the procedure to be adopted if a road is prejudiced by the shade of hedges along the side of the road or of trees growing near the hedges so that the sun and wind are excluded from the highway, or by a branch of a tree overhanging the road, but that it has no application to a case where a tree has fallen across the highway. That is the only obligation imposed upon the occupier of land by the Highway Act. It would be very hard if the statute were strained so that an occupier of land who has not the means of removing a fallen tree from the highway were to be held liable for an accident thereby caused to a person passing along the highway. There is nothing in the Act which imposes such an obligation upon him. In *Gully* v. *Smith* (1) the occupier of the land had had the opportunity of removing the obstruction from the highway but had failed to do so, and the Court accordingly held that he had thereby been guilty of wilful obstruction to the highway within the meaning of s. 72 of the Act of 1835. It is possible to argue that where a tree has fallen across a highway and the occupier of the land on which the tree was growing has received a notice from the surveyor of highways calling upon him to remove it, but has failed to remove it within a reasonable time and an accident happens, the occupier would be liable, notwithstanding that the tree fell through the "act of God," the ground of liability being that he had not obeyed the order of the surveyor of highways and had failed to remove the tree within a reasonable time: see *Gully* v. *Smith* (1). But the county court judge did not decide this case upon that ground. He appears to have decided it upon the ground that inasmuch as the defendant knew that the tree which was growing upon his land had fallen across the highway he was thereafter responsible for lighting it and warning persons travelling along the highway of the existence of the obstruction, and that he was guilty of negligence because he failed to do this. I think there was no evidence upon which the county court judge could properly come to that conclusion.

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He said that there was some slight negligence on the part of the defendant, but I am unable to see any evidence of negligence. It may be that the defendant was under a duty to furnish a lamp to light the tree when requested to do so by the highway surveyor, but it seems to me that there was no duty upon the defendant in the circumstances to light the tree. The county court judge said in delivering judgment: "During the day the foreman of the road came, and no doubt it came to the defendant's mind that at that particular time the public authority had taken charge of the road, but, in my opinion, they had done nothing of the kind. The public authority did not take possession of the road to warn the public against the consequences until afterwards. Towards dusk the defendant sent down a man to take charge of the tree. A good deal was made of the exact time, but at all events I find that for a short time, and only for a short time, there was no person in charge of the tree to warn the public travelling on the highway, and in my judgment there was some slight negligence in that. Defendant did his best, but his best was not sufficient, and for a short time that tree was undefended, and any person passing along the road might sustain injury." I think there was no duty upon the defendant to keep perpetual watch over the tree so as to warn persons passing along the highway, and that there was no evidence of failure on his part of his duty with regard to the fetching of the light which the road foreman asked him to fetch. The lamp could not be fetched in a moment, and it was during the time that the lamp was being fetched that the accident happened. In the circumstances I fail to see any evidence at all of negligence on the part of the defendant, and this appeal must therefore be allowed.

AVORY J. I am of the same opinion. I think it is clear from the county court judge's judgment that the defendant is not in any sense answerable for the original fall of this tree across the highway. The county court judge finds that it was blown down by a gale which was in the eye of the law an act of God. That being so, the judgment of the county court judge in favour of the plaintiffs can only be supported if we are prepared to hold that in the case of a fallen tree causing an obstruction to the highway a duty was by law cast upon the defendant to light the tree as

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it lay across the highway or to place some one there to warn persons travelling along the highway of the existence of the obstruction. I am not satisfied on reading the county court judge's judgment that, even taking the view of the law which the county court judge did, there was any evidence of negligence on the part of the defendant. The county court judge said this: "Towards dusk the defendant sent down a man to take charge of the tree. A good deal was made of the exact time, but at all events I find that for a short time, and only for a short time, there was no person in charge of the tree to warn the public travelling on the highway." The county court judge therefore does not base the defendant's liability upon the absence of a light but upon his not putting some one there to warn the public travelling on the highway of the existence of the obstruction. The county court judge continued: "And in my judgment there was some slight negligence in that. Defendant did his best, but his best was not sufficient." I fail to see how a man can be said to have done his best and at the same time be guilty of negligence.

But, even supposing that the finding of the county court judge that the defendant was guilty of negligence be a finding of fact which is binding upon us, we must then see whether there was any duty cast by law upon the defendant to light the tree or to warn passers-by of the existence of the obstruction. In my opinion s. 65 of the Highway Act, 1835, does not apply at all to such a case as this. It may be that if the defendant, after receiving a notice from the surveyor of highways calling upon him to remove the tree, had failed to remove it within a reasonable time, he would have been guilty of wilful obstruction under s. 72 as interpreted in *Gully* v. *Smith*. (1) It is clear that the decision in that case did not proceed upon any act of the defendant in allowing the wall to fall on to the highway; the judgment proceeded entirely on the fact that after the landslip had taken place the defendant failed to remove the obstruction after receiving notice calling upon him to do so, and Lord Coleridge C.J. held that in the circumstances the defendant had been guilty of wilful obstruction to the highway within s. 72 of the Act of 1835. But it is not necessary to decide that point, for it is not sought in the present case to make him

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liable by reason of his failure to remove the tree; it is sought to make him liable because he failed to light it or to place some one there to warn persons travelling along the highway of the existence of the obstruction. I do not, however, think that s. 72 can be construed as imposing any obligation upon an occupier of land upon which a tree was growing, and which has fallen across the highway without any negligence on his part, to light the tree or to place some one there to warn persons passing along the highway of the existence of the obstruction during the period before it is removed. In my opinion, therefore, the appeal ought to be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Gedge, Fiske & Gedge, for A. E. Floyd, Bishop's Stortford and Dunmow.*

Solicitors for defendant: *G. H. Walker & Tree, for William Gee & Sons, Bishop's Stortford.*

J. S. H.

THOMAS *v.* HAMLYN & CO.

1916

Dec. 14.

[1916 T. 2176.]

Principal and Agent—Manager—Remuneration—Commission on Annual Net Profits—Prior Deduction of Excess Profits Tax—Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), Part III.—Finance Act, 1916 (6 & 7 Geo. 5, c. 24), Part III.

The plaintiff was engaged as manager of four of the numerous branches of the defendants' business, his remuneration being a commission of 15 per cent. of the net profits of those four branches treated as a whole. In computing the net profits of the four branches for the purpose of ascertaining the sum due to the plaintiff for commission the defendants claimed to deduct a proportionate amount of the "excess profits duty" payable in respect of the profits of their business:—

Held, that the "excess profits duty" could not be deducted in computing the net profits upon which the plaintiff was entitled to receive a commission.

ACTION tried before Rowlatt J. without a jury.

The defendants carried on a large business with branches in many parts of the kingdom. By an agreement in writing, made in May,

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1916, the plaintiff was appointed the manager of the branches of the defendants' business in four specified towns for a term of ten years on the following terms (among others): "(3.) The remuneration is to be a sum equal to 15 % of the net profits, to be arrived at as hereinafter provided, of the branches the business which he is now appointed to manage." "(5.) In determining the net profits on which commission is to be payable the various branches under the management of C. E. Thomas are to be treated as a whole so that in the event of a loss being incurred at one or more of the said branches such loss is, subject as hereinafter mentioned, to be deducted from the profits made at the other branches under the management of C. E. Thomas in arriving at the amount on which his commission is to be calculated, provided that the total deduction (if any) in respect of losses is not to exceed 500*l.* in any year . . . ." "(6.) The net profits referred to in clause 3 are to be the net profits after charging all and every expense of the said branches including rent rates lighting insurance bad debts discount depreciation of all wasting assets repairs and renewals reserve for doubtful debts interest on the capital employed in the said branches as shown by their statements of assets and liabilities at the last preceding balancing date . . . . an allowance of 200*l.* per annum for travelling and head-office expenses and all other expenses and allowances incurred in connection with the said branches excepting only the commission payable to the said C. E. Thomas . . . ." "The auditors of the [defendants] shall so soon as they have completed the audit of the accounts for the preceding year make and deliver to . . . . C. E. Thomas a certificate stating the amount of the net profits of each of the branches under the management of C. E. Thomas and of the amount of the commission payable to him calculated as aforesaid and such certificates shall be binding and conclusive on both parties hereto unless either party believing some mistake has been made shall within twenty-one days of the receipt of such certificates give notice to the auditors with particulars of the objections when the auditors shall reconsider and if necessary amend the accounts."

In July, 1916, the auditors completed their audit of the defendants' accounts for the preceding year and made and delivered to the plaintiff a certificate of the amount of commission payable to him, and the defendants duly paid that amount to the plaintiff before this

action was brought. The auditors' certificate showed that in arriving at the net profits of the four branches managed by the plaintiff they had deducted a proportionate amount of the "excess profits" duty payable by the defendants in respect of their business. The plaintiff did not make any objection to the certificate in the manner provided by the agreement.

The plaintiff claimed the sum of 385*l.* for balance of commission due to him upon the ground that in ascertaining the net profits a deduction had been made in respect of the "excess profits duty." The defendants denied that any balance of commission was due, and alleged that the plaintiff was bound by the auditors' certificate.

Macaskie (*Douglas M. Hogg* with him), for the plaintiff. The main question is whether under the agreement between the parties the defendants are entitled to deduct excess profits duty, chargeable under the Finance (No. 2) Act, 1915, and the Finance Act, 1916, in order to ascertain the amount of the net profits of the four branches upon which the plaintiff is entitled to be paid a percentage. In the first place, the plaintiff is to receive a percentage upon the net profits of those branches of the business of which he is the manager, whereas the excess profits duty is levied on the excess profits of the whole of the defendants' business, which has many other branches. There is no excess profits duty at all in respect of any particular branch or branches of the defendants' business. Further, the excess profits duty is really an income tax, and income tax cannot be deducted in ascertaining the net profits of a business: *Johnston* v. *Chestergate Hat Manufacturing Co.* (1) The net profits are first ascertained and then income tax is assessed upon those net profits.

Eustace Hills, for the defendants. This tax, being a tax on profits and not a tax on income, is an outgoing which can be deducted before the net profits are ascertained; the net profits cannot be arrived at, within the meaning of this agreement, until the excess profits duty has been deducted: *London County Council* v. *Attorney-General.* (2) The certificate given by the auditors is final and conclusive against the plaintiff according to the terms of the agreement, unless questioned as therein provided; it is right in form and

(1) [1915] 2 Ch. 338. (2) [1901] A. C. 26.

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has been given upon a right principle. The plaintiff is therefore precluded by the certificate from raising this claim.

ROWLATT J. I think there is no real difficulty in this case. The question is whether the plaintiff, who, as manager of certain branches of the defendants' business, has a right to receive as remuneration 15 per cent. of the net profits of those branches, is entitled to have that percentage calculated upon the net profits without deduction of the excess profits duty.

The question may be stated thus: In the simple case of a business without any branches where a manager is entitled to a percentage upon the net profits, is the excess profits duty to be deducted before ascertaining those net profits? It is conceded that income tax could not be deducted in such a case, for the plain reason that the percentage is a charge upon profits and income tax is a tax upon profits, and both the percentage and the tax are claims upon the same fund and both must be paid in full out of that fund. It is contended that the excess profits duty is not income tax; but, except that there are variations in the method of computation, I cannot see what else it is but an income tax. It is a tax upon the profits made during the year in so far as they exceed a certain standard. There are, indeed, distinctions with respect to the allowances and deductions, but they do not make it different from income tax. Excess profits duty is simply a claim by the Government to take a share of the profits just as in the case of income tax. With respect to the profits, the manager entitled to a percentage and the Government to duty both come in on the same footing and both must be paid in full.

I think, therefore, that upon the broad question the plaintiff is right. Further, when we consider this particular agreement, the plaintiff is clearly right upon another ground. This business has numerous branches and the plaintiff is concerned only with four of them, and he is entitled to a percentage upon the net profits of those four branches taken together. There is no excess profits duty in respect of any particular branch; it is a tax upon the business as a whole. Therefore under this agreement there cannot be any question of deducting excess profits duty.

The further point was taken that the certificate of the auditors is

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conclusive and precludes this claim by the plaintiff. I think that the certificate of the auditors which has been produced shows upon its face that it is not such a certificate as is required by the agreement, and therefore it cannot stand in the way of this claim by the plaintiff.

The plaintiff therefore succeeds in this action, and I give judgment for him for the agreed amount of 385*l.*

Judgment for plaintiff.

Solicitors for plaintiff: *Hargraue, Son & Barrett, for Robert Scholes & Co., Manchester.*

Solicitors for defendants: *Wood & Wootton.*

J. H. W.

COMMISSIONERS OF LAND TAX FOR THE EAST RIDING OF YORKSHIRE *v.* EARL OF LONDESBOROUGH.

1916

Nov. 9; *Dec.* 13.

Land Tax—Parish Quota fixed at Amount above that authorized by Law—Excessive Levy of Tax—Duty of Commissioners to apply Surplus in Redemption of Tax—6 Geo. 4, c. 32, s. 1—Revenue (No. 2) Act, 1861 (24 & 25 Vict. c. 91), s. 40—Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 114, sub-s. 9.

By s. 114, sub-s. 9, of the Taxes Management Act, 1880 (re-enacting s. 40 of the Revenue Act, 1861, thereby repealed), the Commissioners of Land Tax are directed to apply any excess or surplus moneys received by them in respect of land tax in the redemption of the land tax chargeable on the parish in which the excess has arisen:—

Held, that the surplus to which such directions relate is to be understood as limited to a surplus arising from the causes specified in the preamble to s. 1 of 6 Geo. 4, c. 32, namely, from the occasional necessity of making the total of the assessments in the parish exceed the authorized quota by reason of the uncertainty as to the occupation of houses and the changes in the size and number of the buildings occupied, and other similar causes, and not as including a surplus arising from the parish quota itself being fixed at an amount not authorized by law.

SPECIAL CASE stated by consent of the parties in an action for the recovery of 16*l.* 8*s.* alleged to be due for land tax for the year ending March 24, 1913.

1. The parish of Easthorpe is, for land tax purposes, included in

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the division of Holme Beacon in the East Riding of the county of York.

2. The defendant and the North Eastern Railway Company are the sole landowners in the parish of Easthorpe and (subject to the matters set forth in this case) the defendant is liable to pay land tax in respect of his lands in the said parish.

3. At the date when the Land Tax Perpetuation Act, 1798 (38 Geo. 3, c. 60), came into operation the quota of land tax annually due in respect of the lands in the said parish was 16*l.* 8*s.*

4. At a date which cannot be precisely ascertained, but which it is, for the purposes of this case, agreed may be taken to be in the year 1846, the quota exigible from the said parish was by the Commissioners for the division of Holme Beacon raised from 16*l.* 8*s.* annually to 21*l.* annually, and the quota of the other parishes was varied. The effect of the alterations in the quota then made was this: the land tax received by the Revenue in respect of the parishes in the said division taken as a whole remained the same, but the amounts payable by the various parishes inter se were varied.

5. One of the landowners in the parishes of Everingham and Thorpe, in the said division, in an appeal drew attention to the revision of the quotas, but neither on that occasion nor in 1866, when the attention of the Commissioners was again directed to the revision, did they restore the original amounts.

6. The quota or supposed quota of 21*l.* was collected in respect of the lands in Easthorpe in every year from 1846 up to the commencement of the tax year commencing March 25, 1912.

7. This increased quota was assessed and collected on the assumption that the Commissioners had the right to raise the amount of the quota due in respect of the lands in Easthorpe, and that it was the proper quota, and none of the powers or duties in respect of surplus land tax conferred or imposed by any of the relevant statutes have ever been exercised or carried out with reference to the sum of 4*l.* 12*s.*, being the difference between the original quota of Easthorpe and the quota collected as herein stated between 1846 and 1912, nor has the same been applied in payment to the assessors.

8. The relevant statutes are:

The Land Tax Act, 1797 (38 Geo. 3, c. 5), ss. 1, 2, and 7.

The Land Tax Perpetuation Act, 1798 (38 Geo. 3, c. 60), ss. 1 and 74.

The Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 180; 6 Geo. 4, c. 32, ss. 1 and 2; 4 & 5 Will. 4, c. 60, ss. 1 and 6.

The Revenue (No. 2) Act, 1861 (24 & 25 Vict. c. 91), ss. 39, 40, and 41.

The Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 114 and Sched. II.

The Finance Act, 1896 (59 & 60 Vict. c. 28), s. 32.

9. On behalf of the plaintiffs it is contended:

(*a*) That 21*l.*, being the amount of the quota fixed by the Commissioners and not appealed against, was, and must be taken to have been, the proper quota for the years from 1846 to 1912.

(*b*) That there never was collected any surplus over the quota, and that consequently none of the powers and duties with reference to surplus land tax ever were, or could have been, exercisable.

(*c*) That until the year 1861, when the 24 & 25 Vict. c. 91 came into operation, there was no provision at all for the application of surplus land tax to redemption, and that, even if there were a surplus, the defendant cannot, with reference to the period up to 1861, complain that it was not applied to redemption.

(*d*) That between 1861 and 1896, when the statute 59 & 60 Vict. c. 28 became operative, no redemption of land tax in fact took place, and redemption not having taken place, the defendant cannot now claim that the surplus (if any) should be deemed, contrary to the fact, to have been devoted to redemption.

(*e*) That the quota 16*l.* 8*s.* fixed by the Commissioners for the year ending March 24, 1913, in respect of the lands in Easthorpe is exigible and ought to be paid.

10. It is contended for the defendant:

(*a*) That 16*l.* 8*s.* being the amount of the quota for the parish of Easthorpe when the Land Tax Perpetuation Act came into operation, the Commissioners had no power to raise the amount of the quota in 1846 to 21*l.*, and that 4*l.* 12*s.* in excess of the proper quota has been paid from 1846 to 1912.

(*b*) That from 1846 to 1912 a surplus over the proper quota has been collected in respect of the lands in the said parish, and

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consequently the powers and duties with reference to such surplus land tax should have been exercised.

(*c*) That the sums of 4*l.* 12*s.*, being surplus land tax collected annually from the said parish from 1846 to 1912, should have been applied to redemption, or alternatively such sums should have been so applied from 1861 to 1912, or in the further alternative such sums should have been so applied from 1880 to 1912, or in the further alternative such sums should have been so applied from 1896 to 1912.

(*d*) That as a surplus over the proper quota of land tax for the said parish has been collected from 1846 to 1912, all the powers and duties in respect of such surplus being applied to redemption must be deemed to have been duly exercised.

(*e*) That each parish stands alone in respect of its quota of land tax, and the fact that the Commissioners varied the amounts paid by other parishes in the Holme Beacon division does not relieve them of their powers or duties in respect of the surplus land tax paid by the said parish.

(*f*) That the whole of the land tax payable in respect of the lands in the said parish was redeemed between 1846 and 1912, or alternatively a part thereof.

(*g*) That on the facts of the case and the law applicable thereto the quota of 16*l.* 8*s.* fixed by the Commissioners to be paid in respect of the lands in the said parish is erroneous.

11. The questions for the opinion of the Court are :

(1.) Whether 21*l.* was the quota properly collected in the parish of Easthorpe in each of the years from 1846 to March 24, 1912.

(2.) If the first question is answered in the negative, whether the surplus land tax collected over the quota ought during any part of the period in question to be treated as applied to redemption, and if so whether it should be so treated—(*a*) for the whole period from 1846 to March, 1912 ; or (*b*) for the period from 1861 to March, 1912 ; or (*c*) for the period from 1880 to March, 1912 ; or (*d*) for the period from 1896 to March, 1912.

Sir George Cave, S.-G., and *W. Finlay, K.C.*, for the Commissioners. By the Land Tax Act, 1797 (38 Geo. 3, c. 5), which was the last annual Land Tax Act, a lump sum was directed to be raised

by a land tax, and certain persons were appointed to be Commissioners for putting the Act into execution. The Act allocated certain specified portions of the said lump sum to the several counties and certain specified towns. The Commissioners were by s. 7 directed to ascertain "the several proportions which ought to be charged upon every hundred, ... ward, or other division" of the said counties and towns, and to appoint certain of their number to act as Commissioners for the several divisions. By s. 8 the divisional Commissioners were directed to cause the several proportions charged on the divisions "to be equally taxed and assessed within every such hundred, ... ward, or other division, and within every parish and place therein," and were required to deliver to the receiver-general of the county or town a duplicate in parchment containing the whole sum assessed upon each parish or place. By the Land Tax Perpetuation Act, 1798 (38 Geo. 3, c. 60), the land tax was made perpetual and the provisions of the last-mentioned Act were, except as expressly varied, re-enacted. By the Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), the 38 Geo. 3, c. 60, was repealed, but it was provided that all the powers and provisions of the Land Tax Act, 1797, should continue in force in relation to land tax except as thereby varied. By the Act 6 Geo. 4, c. 32, it was provided in s. 1 that, whereas there was a difficulty in collecting the exact amount of a parish quota of the land tax, the Commissioners of the division should, where the assessment made and allowed for a parish exceeded by 5*l.* the amount of the parish quota, send to the Commissioners of Taxes a certificate showing the quota returned in the parchment duplicate of assessment and the amount of the excess, and should pay the amount of the excess to the Receiver-General of Land Tax. In 1853 it was held by the Court of Queen's Bench in *Reg.* v. *Land Tax Commissioners for the Tower Division* (1) that the duty of the Commissioners in assessing the contributions by the several parishes within a division was regulated, not by 38 Geo. 3, c. 5, s. 8, but by 38 Geo. 3, c. 60, s. 74 (re-enacted by 42 Geo. 3, c. 116, s. 180), and that that Act treated the quota payable by each parish to ards making up the amount charged on the division as permanent at its then proportion to the other parishes of the division, even though

(1) (1853) 2 E. & B. 694.

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in course of time the result was that an unequal poundage was levied in the several parishes. That decision is binding in this Court, and therefore for the purposes of the present argument it must be assumed that the proper quota of the parish of Easthorpe was 16*l.* 8*s.* and no more. At the same time the Crown reserves its right to question the correctness of that decision elsewhere. By s. 39 of the Revenue (No. 2) Act, 1861 (24 & 25 Vict. c. 91), where the assessment to the land tax for any parish or place "shall exceed by any amount or sum whatever the quota or proportion payable to Her Majesty by or for such parish or place" the surplus is to be paid to the receiver-general and by him into the Bank of England to an account to be opened for the purpose, and to be credited to the particular parish or place. By s. 40 provision is made that the surplus so credited to the parish when it reaches a particular sum shall be applied in the redemption of the land tax of that parish. By the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), those sections are repealed, but they are re-enacted by s. 114, which provides by sub-s. 1 that the Commissioners are to certify on the warrant for making the assessment delivered each year to the parish assessors "the amount of the quota or sum in charge against such parish." By sub-s. 3, if the total amount of the sums charged in any year for a parish "exceeds the actual amount of the quota or proportion of land tax charged and to be raised in such parish" the clerk to the Commissioners is to insert at the foot of the parchment duplicate of charge made under 38 Geo. 3, c. 5, a summary in the form given in Sched. II., Form 18. By sub-ss. 7 and 8 the surplus is to be paid into the Bank of England to a special account as before; and by sub-s. 9, "Whenever the amount of such surplus land tax standing to the credit of any parish in any such account as last mentioned shall be sufficient, according to the rules established by law for computing the consideration of money for the redemption of land tax, to redeem the sum of three pounds land tax, or to redeem the whole of the land tax chargeable on such parish if the same shall be less than three pounds," it shall be applied in such redemption. The quota referred to in both the two last mentioned Acts means the quota in fact charged whether rightly or wrongly in the parchment duplicate and returned by the Commissioners, and not the quota which ought by law to have been

so returned. If that be so, there was never any surplus in the parish of Easthorpe to apply in redemption. If an excessive quota was allocated to the parish, each of the taxpayers had a remedy by appeal under s. 8 of the Act of 1797 : *Simpkin* v. *Robinson*. (1) The individual ratepayer might give as a reason for his own rate being too high that the quota of which it was a proportion was wrong. It cannot be right that a landowner should stand by while seeing his parish assessed too high and the other parishes in the division too low and then after seventy years complain and ask for restitution. If the quota as fixed by the parchment duplicate is not quarrelled with at the time it must be taken as the quota mentioned in the redemption section. In any case there is no ground for claiming that the surplus, if any, was applied to the redemption of land tax before 1861, for the Revenue Act of that year was the first which gave any directions as to a surplus being so applied. And there can be no presumption of any such application until 1896, for it is only by the Finance Act, 1896 (59 & 60 Vict. c. 28), s. 32, that the surplus is to be deemed to have been applied in redemption.

Tomlin, K.C., and *W. Allen*, for the defendant. The quota of the parish was, as is conceded by the Crown, definitely fixed in 1798. The case of the Commissioners for the Tower Division shows that, having been so fixed, it could not afterwards be lawfully altered. The Solicitor-General has contended that even so the quota with reference to which the excess is to be computed is not the quota fixed in 1798, but what the Commissioners, acting under a mistaken view of the law, have in fact stated to be the quota. But the Act of 6 Geo. 4, c. 32, which is the first Act that makes any reference to the surplus land tax, speaks in s. 1 of "the quota or proportion payable by each parish or place." "Payable" must mean legally payable, not what the Commissioners require to be paid. The same phrase "quota payable" is again used in the Revenue (No. 2) Act, 1861. It is said that if there was an overcharge the taxpayer's remedy was by appeal. But he can only appeal under s. 8 of the Act of 1797 if he is unequally assessed in comparison with the other taxpayers in the parish. It may be that he was bound by his individual assessment, but that does not affect his right to object that the quota was wrong.

(1) (1881) 45 L. T. 221.

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It must be taken, therefore, that as too large a sum was collected there was a surplus which ought to have been dealt with according to law. It may be that there is a difficulty in saying that the surplus ought to have been applied in redemption of the land tax before 1861, for though s. 2 of 6 Geo. 4, c. 32, provides that the surplus shall be applied "in part payment and discharge of any assessment of the land tax made or to be made" on the parish or place, that Act only applies where the surplus in any one year exceeds 5*l.*, whereas in Easthorpe the annual surplus amounted only to 4*l.* 12*s.*, but it is clear that it ought to have been so applied since that date. No complaint can reasonably be made that the taxpayer ought to have objected to the non-performance by the Commissioners of their duty on each occasion on which it arose, for the individual taxpayer had no means of knowing whether they were doing their duty. If over a period of years a sum is paid in excess of the quota, and there are provisions in an Act saying that it should be applied in a particular way, it must be deemed to have been so applied, wholly apart from any express statutory declaration to that effect. The taxpayer ought not to be in a worse position than he would have been in if a servant of the Crown had misappropriated the money. But further there is express statutory enactment that it shall be deemed to have been so applied. Sect. 32, sub-s. 3, of the Finance Act, 1896, says that "Any surplus land tax in any land tax parish . . . . received under the Land Tax Acts shall be deemed to have redeemed so much of the unredeemed quota of the land tax in the parish as is equal to one thirtieth part of such surplus." That must refer to past as well as future receipts. The words "shall be deemed to have redeemed" would be a strange phrase to employ if they are to be read as limited to future payments.

Sir George Cave, S.-G., in reply.

Cur. adv. vult.

Dec. 13. ATKIN J. read the following judgment:—In order to determine the questions raised by this case, it is desirable to survey the provisions for the raising of land tax contained in the Land Tax Act of 1797 so far as they relate to land tax proper. The Act of 38 Geo. 3, c. 5, was the annual Act granting the land tax and contained provisions substantially similar to those in the preceding years

from 1 Will. & Mar. c. 3, modified from time to time. By the Act a total sum was granted to be collected in different specified sums charged on named areas, which, generally speaking, were counties, though they included some towns and other areas not coterminous with counties. For these areas, which it is convenient to call counties, Commissioners were appointed whose duty it was to collect the sum charged on the county. This they were to do by dividing the county into smaller areas, which I will call divisions, and allocating to each division a portion of the total county charge. A certain number of their own body they appointed Commissioners for each division. The divisional Commissioners similarly allocated the total divisional charge to smaller areas, generally the parish. It will be convenient to call the sub-divisional area the parish and the amount allocated to the parish the parish quota. The divisional Commissioners appointed two assessors for each parish whose duty it was to assess the parish quota by an equal pound rate upon all lands within the parish, and to deliver a copy of their assessments to the Commissioners, who then appointed two collectors for each parish to collect the assessments. Provision was made for appeal to the divisional Commissioners by persons who should think themselves aggrieved by being over-rated, and it is provided by s. 8 that the Commissioners were required to deliver a schedule or duplicate in parchment containing the whole sum assessed upon each parish to the receiver-general of each county and also to the King's Remembrancer's Office.

In the same session of Parliament was passed the Act for making land tax perpetual, 38 Geo. 3, c. 60. One of the main objects was to provide facilities for the redemption of the land tax. With these the present case is not concerned. But s. 1 made perpetual the several sums charged upon counties in the annual Act of that session above mentioned, and also made perpetual the various provisions in that Act for collecting the tax. It was apparently for some time afterwards a moot point whether this Act still enabled the Land Tax Commissioners to alter the parish quota within the counties. But in 1853 this question was put to rest by the decision of the Court of Queen's Bench in the case of *Reg.* v. *Land Tax Commissioners for the Tower Division.* (1) There it was

(1) 2 E. & B. 694.

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decided that the effect of the Land Tax Perpetuation Act, 1798, was to fix not only the county quota but also the parish quota at the sums charged in 1798. Now it appears in the present case that in 1846 the Land Tax Commissioners had purported to increase the quota for the parish of Easthorpe from 16*l.* 8*s.*, the quota charged in 1798, to 21*l.*, and this increased quota has in fact been collected and paid ever since. The defendant is the principal landowner in the parish, and the question in this case is as to the effect of this mistake upon his liability to pay the tax. The defendant is now sued for 16*l.* 8*s.* land tax, and he relies for defence upon the provisions of certain Acts of Parliament dealing with surplus land tax collected over and above the quota payable for the parish, and says that by reason of the statutes in question the land tax now payable by him has been either entirely or partially redeemed.

The first Act dealing with a surplus is the Act 6 Geo. 4, c. 32, the preamble to which is in my judgment important. The preamble is in these terms: "Whereas the Commissioners acting in the execution of the Acts relating to the land tax have in certain districts, by reason of the frequent changes in the extent and number of buildings and inhabitants and in the occupation of houses after assessments made upon them, or for other causes, been unable to apportion, assess, and raise the quota or proportion payable by each parish or place for the land tax without exceeding the amount of such quota in the aggregate of the assessments made and delivered to the several collectors thereof, whereby an excess beyond the quota has arisen in the collection: And whereas it is therefore expedient to make provision as well for avoiding as much as possible any such excess in the assessment and collection, as for the application of monies arising therefrom in aid and for the benefit of the parish or place in the manner hereinafter provided: Be it therefore enacted" and so on. The material sections of the Act, which I do not think it necessary for me to read in this judgment, appear to me to be ss. 1, 2, 3, 4, and 7. From a survey of the whole of this Act it appears to me that the surplus contemplated is a surplus arising from causes similar to those mentioned in the preamble, namely, the occasional necessity of making the total of the assessments exceed the quota by reason of the uncertainty as to the

occupation of houses and the changes in the size and number of buildings occupied. What appears to be intended to be dealt with is the surplus of money received on assessments over the quota in satisfaction of which the assessments purport to be made, not over another and a different quota. I am influenced in this view by the words in s. 1 as to the "quota returned in the parchment duplicates of assessment," and the provisions of s. 3 requiring "the amount of the quota or sum in charge" against the parish "according to the parchment duplicates thereof" to be delivered to the assessors together with the warrants for making the assessment. The surplus contemplated is a casual surplus of the sum in fact raised over the precise sum contemplated to be raised. I do not think it ever was intended that if the Commissioners by mistake or wilfully fixed an excessive quota the balance must be applied under the provisions of the Act. Sect. 7 appears to give legal authority to collect the surplus arising from the excessive assessment in question; and I cannot conceive that such powers would be given if the Act was intended to apply to cases where the quota itself was unlawfully excessive. Similar provisions to those in s. 7 appear to be enacted in s. 114, sub-s. 4, of the Taxes Management Act, 1880, which is an Act also relied on by the defendant. Nor do I think it probable that if the surplus arose from the quota itself being unlawfully fixed, by which I mean being fixed at an amount not authorized by law, the collectors would have been allowed by the statute to retain the excess up to 5*l*. The provisions of the above Act for dealing with the surplus collected over the quota have been modified from time to time by statute, but in my opinion the subject-matter dealt with remained the same. By 4 & 5 Will. 4, c. 60, s. 6, power was given to the Land Tax Commissioners for a division to remunerate the assessors out of the surplus land tax mentioned in the Act of 6 Geo. 4, c. 32. This again is a provision which seems unnatural if the surplus contemplated was one that might arise by unlawfully increasing the amount to be collected, though reasonable enough if the surplus arose under the conditions which I think are applicable. Where an excessive quota is exacted it appears to me that the remedy is by appeal, or possibly, if the money is paid under a mistake or duress, by the proper proceeding for the recovery of such money. As I have said, I do not think the statutory provisions contemplate

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such a case. Sects. 39 to 44 of 24 & 25 Vict. c. 91 make different provisions for the application of the surplus "in every case where the assessment made or to be made and allowed under the provisions of the Acts relating to land tax for or upon any parish or place in any district or division in Great Britain shall exceed by any amount or sum whatever the quota or proportion payable to Her Majesty by or for such parish under the provisions of the said Acts." The words are not quite the same as in the previous Act, but I think the subject-matter was the same. The provision as to the payment of assessors out of the surplus was retained, though the 5*l.* minimum was abolished. The other statutes which I must refer to are the Taxes Management Act, 1880, s. 114, and the Finance Act, 1896, s. 32. They contain provisions as to the application of the surplus which it would be necessary to consider if the present case came within them; but as they seem to me to refer to the same subject-matter only as the earlier statutes I need not further deal with them.

It is desirable, I think, to direct attention to two other considerations which, though not conclusive, are not without importance. First, in such cases as this where the Commissioners have unlawfully raised the quota of one parish and diminished that of another, the total revenue collected by the land tax remains the same. There is no surplus in fact. If the defendant's contention is correct, so far from there being a surplus, the revenue is diminished by the extent to which the land tax charged on the particular parish is redeemed under the statutes. Secondly, if the surplus contemplated is excess of assessment collected over the quota which ought at law to have been charged, then in cases where the de facto quota has been too small there never could be any surplus over the true quota, and any redemption which may have taken place on the footing of a surplus over the de facto quota is invalid, or at any rate open to question.

In the view I have taken it becomes unnecessary to decide the questions which were argued as to how far the land tax must be deemed to have been redeemed. In this case I do not see why the defendant's predecessors in title should not have discovered at the time the mistake made in 1846; and if, with the means of ascertaining the true facts, they have paid an excessive sum for nearly

seventy years, I have some doubt whether they are entitled to ask to have that deemed to be done in their favour which was not in fact done. But I do not give any judgment on this point. I have carefully weighed Mr. Tomlin's very helpful argument, but, though the case presents difficulties, I have felt bound to construe the statutes in the sense indicated above. I have been a little embarrassed by the precise form of question 1 in the case. I have a difficulty in saying that 21*l.* was the quota properly collected from 1846, in view of the decision in the *Tower Case.* (1) But even if it was not properly collected it follows from my judgment that the surplus ought not to be treated as applied to redemption. This question is asked in question 2, though the result of a negative answer is not stated to be agreed. It seems, however, to follow that the result is that judgment should be entered for the plaintiffs for the amount claimed.

Judgment for plaintiffs.

Solicitor for plaintiffs : *Solicitor of Inland Revenue.*
Solicitor for defendant : *Royds, Rawstorne & Co.*

(1) 2 E. & B. 694.

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MARTEN *v.* WHALE.
THACKER, THIRD PARTY.

Sale of Goods—Buyer in Possession—Resale—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 25, *sub-s.* 2—*Third Party Procedure—Indemnity—Order* XVI., *r.* 48.

The fact that an agreement for the sale of goods is made subject to a condition in favour of the vendor, and which condition consequently the vendor is at liberty to waive, does not prevent the other party to the contract from being a person who has "agreed to buy" within the meaning of s. 25, sub-s. 2, of the Sale of Goods Act, 1893.

Where, a purchaser having bought a specific chattel from a seller who had no title to it, an action is brought by the true owner against the purchaser for its recovery, the right of the purchaser to get back the price that he has paid is not a right of indemnity, and the seller cannot be brought in as a third party to the action.

TRIAL of action before Rowlatt J.

The plaintiff and one Thacker on June 27, 1916, entered into the following agreement: "It is agreed between Frank Thacker and Frank W. Marten that the said F. Thacker sells and the said F. W. Marten buys the plot of land selected by the purchaser having a frontage of 100 feet to the new road now made to the satisfaction of the local authorities, and situate on the Banstead Downs estate, Sutton, with a depth of 400 feet freehold and for the sum of 385*l.* subject to purchaser's solicitors' approval of title and restrictions—the said sale and purchase to be completed before 24th July, 1916."

"In consideration of the said transaction the said Frank W. Marten agrees to sell and the said Frank Thacker agrees to purchase the 12/1 Renault saloon motor car at and for the sum of 300*l.*, completion of such sale and purchase to be carried out simultaneously with the above transaction."

Two days after the signing of this agreement the plaintiff allowed Thacker to have possession of the car "on loan" and took a receipt for it as follows:—

"Received on loan the above motor car in good condition, to be returned to you on demand.

"Signed F. T.

"29th June, 1916."

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In August Thacker, who had not obtained the plaintiff's solicitors approval of title and restrictions, sold the car to the defendant, who bought in good faith, without notice of any defect in the seller's title.

The plaintiff brought this action against the defendant for the detention of the car. The defence was that as Thacker was in possession of the car at the time that he sold it to the defendant he passed a good title to it under s. 25, sub-s. 2, of the Sale of Goods Act, 1893; but the defendant, in the event of its being held that he had acquired no title by his purchase, claimed to be entitled to indemnity over against Thacker, and he accordingly served upon him a third party notice under Order XVI., r. 48.

Patrick Hastings, for the plaintiff. The case depends on the construction of the agreement of June 27. It is contended that it is not an agreement to buy the car within the meaning of s. 25, sub-s. 2, of the Sale of Goods Act. It is not an enforceable contract. It was conditional upon the validity of the agreement as to the land, and that agreement was not binding because it was "subject to purchaser's solicitors' approval of title and restrictions": see *Winn* v. *Bull* (1), *Lloyd* v. *Nowell* (2), *Von Hatzfeldt-Wildenburg* v. *Alexander* (3), and *Helby* v. *Matthews*. (4)

Holman Gregory, *K.C.*, and *W. F. Swords*, for the defendant. Sect. 25, sub-s. 2, of the Sale of Goods Act, 1893, provides that where a person has bought or agreed to buy goods and obtains possession of them with the consent of the seller the sale of such goods by such person to a third person who buys in good faith without notice of the first seller's rights validly transfers the property in the goods. Thacker had agreed to buy the car within the meaning of the sub-section, and therefore there was a valid transfer of the property in the car to the defendant: see *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.* (5) As to the first part of the document, there was a binding contract to purchase the land, which could be enforced by a claim for specific performance. "Title" is a wider term than "restrictions," and "subject to approval of

(1) (1877) 7 Ch. D. 29.
(2) [1895] 2 Ch. 744.
(3) [1912] 1 Ch. 284.
(4) [1895] A. C. 471.
(5) [1899] 1 Q. B. 643.

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restrictions" means nothing more than approval of title. The contract could be specifically enforced subject to compensation for any defects as to title: see *Hussey* v. *Horne-Payne* (1), per Lord Cairns. The second part of the document was a totally independent contract.

Cur. adv. vult.

Dec. 20. ROWLATT J. read the following judgment:—This action was brought to recover a motor car, the property of the plaintiff, which was sold and delivered to the defendant in August last by one Thacker without authority. The defence was that Thacker was a person who had agreed to buy the motor car from the plaintiff and was in possession of it with the consent of the plaintiff, and that as the defendant bought in good faith (which is admitted) she obtained a good title under the 25th section of the Sale of Goods Act. The agreement to buy relied upon is to be found in a document signed by the plaintiff and Thacker and dated June 27, 1916. Upon the effect of this document the case turns. For the moment, and in order to complete the statement of facts, it is to be observed that the agreement was executory as regards the property passing, and the property had not passed at the date of the transaction with the defendant. However, two days after the agreement the plaintiff had let Thacker have possession of the car "on loan" and took a receipt for it expressed to that effect. This meant that the car was not delivered in execution of the contract, but that the property of the plaintiff remained unaffected. Thacker, however, got possession of the car with the plaintiff's consent, and so far the requirements of the section were satisfied. Had he agreed to buy it within the meaning of the same section? That involves an examination of the document of June 27.

This document consists of two parts. In the first part it is stated to be agreed between Thacker and the plaintiff that Thacker sells and the plaintiff buys a plot of land to be selected by the plaintiff on a certain estate for 385*l.* "subject to purchaser's solicitors' approval of title and restrictions," and completion was to be on or before July 24, 1916. The second part of the document states that "In consideration of the said transaction" the plaintiff

(1) (1879) 4 App. Cas. 311, 312.

agrees to sell and Thacker agrees to purchase the motor car now in question for 300*l.*, "completion of such sale and purchase to be carried out simultaneously with the above transaction." Upon this Mr. Hastings, for the plaintiff, contended that the first part of the document relating to the plot of land was not an agreement at all because it was subject to the purchaser's solicitors' approval of title and restrictions, and further that the second part was dependent on the first part and failed if the first failed. The defendant denied both propositions. The plaintiff to succeed in the action must succeed on both points.

Now as regards the first point, namely, whether there is any contract here as to the plot of land, it is to be observed that the parties manifestly intended to make a contract by this document. It is not one of those cases where it is sought to find a contract in correspondence and where the parties have not joined in signing a document by which, as here, they state they have agreed. In those cases the question is whether the correspondence discloses that they have in fact agreed though they have not, in terms, proclaimed that they have. In such cases the effect of the reservation of a matter for approval has to be considered with a view to ascertain whether that negatives an intention to be bound in praesenti. Here that intention appears, and if the presence of the stipulation for approval prevents there being a contract, it must be because thereby the supposed words of agreement become incapable of expressing a definite legal obligation. Again, this is not one of those cases where the difficulty is caused by a reference to a further and more formal contract to be prepared. In such cases, if the preparation of the further document is held as a matter of construction to be a condition, then, as was pointed out by Parker J. in *von Hatzfeldt-Wildenburg* v. *Alexander* (1), the first document, though it otherwise looks like a contract, does not have effect as one. The case just mentioned was a case of this class, as will be seen if Parker J.'s judgment is carefully read. There was a clause in one of the documents alleged to form the contract providing for the approval of the freeholder's title (the interest immediately in question being leasehold) and the preparation of a formal contract. Parker J. held that the approval of the freeholder's title could only

(1) [1912] 1 Ch. 284, 289.

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be a condition, as opposed to a mere reference to an intended examination of title in the ordinary course (which it could not be), and therefore that the other requirement in the same clause, namely, that desiderating a further formal contract ought to be given the same character, and for that reason, namely, because the preparation of a formal contract was a condition, he decided, in conformity with the canon he propounded at the beginning of his judgment to which I have already referred, that there was no contract. He did not decide that the necessity of approval of the freeholder's title, even though a condition, prevented there being a contract. Mr. Hastings attempted to use this decision as if that was the proposition affirmed by Parker J., but for the reasons I have just given I think that view is mistaken. In my opinion there is here a contract for the sale and purchase of this plot of land (no point was raised as to the plot being one to be selected), but subject to a condition, which is part of the contract and is not precedent to the existence of a contract, that the title and restrictions shall be approved. It is a condition which materially diminishes the security of the vendor, but it does not seem to me to eat up the obligation in toto, and it is a condition which, being entirely for the benefit of the purchaser (unlike that in *Lloyd* v. *Nowell* (1)), can be waived by him.

This being then the position as regards the plot of land, what is the position, assuming in favour of the plaintiff that the two parts of the agreement are interdependent and not separate, of Thacker as regards the motor car ? He is under an obligation unqualified by any option on his part to buy the car. He could not escape from that obligation by making default in producing his title to the plot, though he might, on the present assumption, be relieved if the plaintiff's solicitors disapproved the title or restrictions. If the plaintiff's solicitors approved or if the plaintiff waived that condition, Thacker would be bound to buy. Is, then, a person who has agreed to buy subject only to a condition in favour of the seller which either may not happen or may be waived by him a person who has agreed to buy within the meaning of the section ? It was decided in *Helby* v. *Matthews* (2) that a person who had an option to buy had not agreed to buy. That is clear. It does not appear to follow, however, that because the agreement to buy may be

(1) [1895] 2 Ch. 744. (2) [1895] A. C. 471.

discharged by a refusal to complete on the part of the seller, justifiable under a condition for his protection, therefore the purchaser has any the less agreed to buy. It certainly could not be said that a person had not agreed to buy merely because it was possible that the vendor might without justification make default in performing something to be done on his part and so discharge the buyer. In other words, a person has agreed to buy even though he may not yet, having regard to still unfulfilled obligations of the vendor, be under an absolutely inevitable obligation to complete. This does not, of course, decide the larger question, and no authority was cited which gives any assistance. It seems to me, however, that the principle of the section is that, where an owner has chosen to give possession to a person whom by reason of an agreement on his part to buy he can convert into a purchaser and thereby entitle himself to the price, there is no injustice in giving validity to a transfer by such person to a bona fide purchaser for value. It seems to me, further, that the words of the statute in the natural sense include this case. A man has agreed to buy when by agreement he has enabled the seller to make him buy whether the seller on his part has absolutely agreed to sell or has any option or may have the benefit of any other condition which may operate to prevent his being obliged to sell. This was the position in which I think Thacker was when he purported to sell to the defendant, and therefore I think the defendant succeeds, even assuming in favour of the plaintiff that the second part of the agreement is dependent on the first—a point which I therefore need not decide. The action is dismissed with costs.

Judgment for defendant.

At the hearing by some mistake Thacker, the third party, was not represented, and the judge adjourned the claim of indemnity over against him so that, if necessary, he might be heard; but the costs of briefing counsel, &c., had been incurred, and an application was now made for his costs against the defendant.

Barrington-Ward, for the third party. Thacker was improperly brought into this action, for the claim which the defendant would have had against him if judgment had been given for the plaintiff

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was not one to which the rules of third party procedure applied. The claim was not one for an indemnity. He is therefore entitled to his costs.

Swords, for the defendant. The defendant was entitled to be indemnified by Thacker against the claim of the plaintiff, for by s. 12 of the Sale of Goods Act, 1893, a seller impliedly warrants that he has a right to sell. That being so, the third party procedure applied. For that proposition the case of *Page* v. *Midland Ry. Co.* (1) is an authority. There a lady having a life interest only in certain land sold it with the usual covenants for title to the railway company in fee and was paid the price of the fee. After her death the remaindermen claimed the value of the land and the company had to pay. The executors of the vendor were brought in as third parties to the action as being liable under the covenants for title, and the Court of Appeal held that the company should recover the value of the land and interest from the date of the life tenant's death. Lindley L.J. spoke of the company's right against the vendor's executors as being one of indemnity.

ROWLATT J. It appears in this case, in which I have just given judgment, that a third party notice was given to Thacker. Thacker has raised, by way of answer, the contention that the claim against him was not a claim for indemnity within the rules governing third party procedure. Now it was said for the defendant, first of all, that the Sale of Goods Act imported a warranty of title into Thacker's transaction with the defendant, and that appears to be so. Then it was said that if there was a warranty of title *Page* v. *Midland Ry. Co.* (1) decided that that gave the defendant a right to be indemnified by Thacker against the claim made in this action within the meaning of the third party rules. Undoubtedly *Page* v. *Midland Ry. Co.* (1) was a case in which the claim of disappointed purchasers of realty against their vendor, who covenanted for title, was adjudicated upon under a third party notice, and the Court of Appeal decided that the purchasers were entitled to recover the value of the land and interest, on the ground that they were entitled to be indemnified against the claim of the plaintiffs; but the point that the third party proceeding was not applicable was never raised.

(1) [1894] 1 Ch. 11.

The parties might not have desired to raise it, and it is not a point that the Court would insist on their raising, it merely being a point of procedure. Now it seems to me that when Lindley L.J. in that case spoke of the indemnity to which the defendants there were entitled he merely meant that they were entitled to recover all the damage that they had suffered, which was the value of the land and interest. It is to be observed that he was the judge who gave the leading judgment in *Johnston* v. *Salvage Association* (1), where he pointed out the rule only applies to cases where the third party is under some obligation, by contract or otherwise, to protect the defendant from the demand of the plaintiff in specie, and that no right of indemnity within the meaning of the rule exists unless the remedy of the defendant against the third party is the same as that of the plaintiff against himself. Even if the measure of the damages is the same it does not follow that it is an indemnity; and where it is not the same it seems to me impossible that it can be an indemnity. Assume that the plaintiff here had succeeded, the defendant would have had to give up this chattel, the motor car. He would be entitled to recover against Thacker on his warranty of title the money he had thrown away by paying him. But the right to recover that money is not a right of indemnity, because the money he paid Thacker is not the same thing as the motor car, and it may not represent the motor car. The defendant may have made a good bargain—he said he did; so he has lost a valuable motor car, perhaps worth 300*l.*, and he may have paid Thacker 200*l.* That is not a right of indemnity. Or it may be that he is entitled to recover the actual value of the motor car which he has handed over. Even in that event, though the measure of damages may be the same, that fact will not make the remedy of the defendant any more one of indemnity. It seems to me the third party rule is inapplicable to the case of a claim in detinue for a specific chattel. Under those circumstances it seems to me that this third party notice was misconceived. What then am I to do? As the case has been presented before me, Thacker has no merits, but can I judicially affect his rights when I have not heard him? For all I know Thacker might have said he had authority to sell. I do not suppose he could substantiate that, but conceivably he might

(1) (1887) 19 Q. B. D. 458.

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have said it, and he has a right to litigate it, and I cannot affect the rights of an absent man merely because I have a certain view about him on the facts presented in litigation between other persons. It seems to me that I must dismiss the third party notice against him with costs.

Judgment for third party.

Solicitors for plaintiff: *Lendon & Carpenter.*
Solicitors for defendant: *Kingsbury & Turner.*
Solicitors for third party: *Martin & Nicholson.*

J. F. C.

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Jan. 11.

THE KING *v.* SECRETARY OF STATE FOR HOME AFFAIRS. *Ex parte* DUKE OF CHATEAU THIERRY.

Alien—Deportation—Power of Secretary of State to order Deportation to a Particular Country—Aliens Restriction Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 12), *s.* 1, *sub-s.* 1—*Aliens Restriction (Consolidation) Order*, 1916, *art.* 12.

The provisions of s. 1, sub-s. 1, of the Aliens Restriction Act, 1914, and of the Aliens Restriction (Consolidation) Order, 1916, made thereunder, do not give a Secretary of State power to order the deportation of an alien to any particular country.

[The C. A. held on appeal, March 16 (see [1917] W. N. 110), that the Secretary of State could not make an order in that form, but could cause the alien to be placed on board a ship selected by the Secretary of State and there detained until the ship left the United Kingdom.]

RULE NISI for a writ of certiorari to remove into the King's Bench Division an order for the deportation of the applicant in order that it might be quashed.

The applicant was a French subject of military age and liable to military service in France who had for some years been resident in England. On November 3, 1916, the Secretary of State for Home Affairs made an order for the deportation of the applicant which was in these terms: "In pursuance of the powers conferred by the Aliens Restriction Act, 1914 (1), and

(1) 4 & 5 Geo. 5, c. 12, s. 1, sub-s. 1: "His Majesty may at any time when a state of war exists between His Majesty and any foreign Power, or when it appears that an occasion of imminent national danger or great emergency has arisen, by Order

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art. 12 (1) of the Aliens Restriction (Consolidation) Order, 1916, I hereby order that . . . . , an alien, shall be deported from the United Kingdom." It was admitted by the Attorney-General on behalf of the Secretary of State that this order was made with the intention and for the purpose of sending the applicant to France and thereby placing him within the power of the military authorities in France.

The applicant obtained the rule upon the grounds (inter alia) that he was a political refugee from France; that there were no facts or materials before the Secretary of State to justify the making of the order; and that there was no power to order his expulsion to France.

Sir F. E. Smith, A.-G., and *G. A. H. Branson* showed cause. From the affidavits and documents before the Court it does not appear that there is good ground for the contention that the applicant is a political refugee from France. The Secretary of State has a general discretion under the Act and Order to make an order for deportation. It is admitted that in this case the intention and object of this deportation order is to send the applicant to France in order that he may fulfil his military obligations there. The Secretary of State has power to make such an order. That question was raised but not decided in *Rex* v. *Brixton Prison (Governor), Ex parte Sarno.* (2) In the circumstances of the present war it is very important with a view to the safety of this country that an allied country such as

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in Council impose restrictions on aliens, and provision may be made by the Order . . . . (*c*) for the deportation of aliens from the United Kingdom . . . . (*k*) for any other matters which appear necessary or expedient with a view to the safety of the realm."

(1) The Aliens Restriction (Consolidation) Order, 1916, art. 12, clause 1: "A Secretary of State may order the deportation of any alien, and any alien with respect to whom such an order is made shall forthwith leave and thereafter, or so long as the order remains in force, remain out of the United Kingdom."

Clause 2: "Where an alien is ordered to be deported under this Order, he may, until he can, in the opinion of the Secretary of State, be conveniently conveyed to and placed on board a ship about to leave the United Kingdom, and whilst being conveyed to the ship, and whilst on board the ship until the ship finally leaves the United Kingdom, be detained in such manner as the Secretary of State directs, and whilst so detained, shall be deemed to be in legal custody."

(2) [1916] 2 K. B. 742.

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France should secure the military services of all its eligible subjects, and that a French subject of military age should not be allowed to stay in this country when required to serve in his own country. The Act and Order give power in general terms to order the "deportation" of any alien, and the word "deportation" involves the right to determine the destination of the person deported and to send him to a particular place. Although this order for deportation may be right in form because it does not order deportation to any particular country, yet the Executive desires a decision upon the point whether there is power to order an alien to be deported to a particular country.

Rawlinson, K.C., and *Barrington-Ward*, in support of the rule. Assuming that there was any power in this case to make any order for deportation, it is clear that there is no power to make an order for deportation to a particular country, and it is now admitted that the sole intention and purpose of this order is to send the applicant to France. The Act and the Order made thereunder only give power to deport an alien, that is, to send him out of this country, and provide that when deportation is ordered the alien shall "forthwith leave and thereafter remain out of the United Kingdom." There is nothing at all in those provisions to import any power to determine the place to which the alien shall be sent. This order is therefore bad and should be quashed.

[They were stopped by the Court.]

VISCOUNT READING C.J. The applicant obtained a rule nisi in this Court for a writ of certiorari calling upon the Secretary of State for Home Affairs to show cause why an order made by him for the deportation of the applicant should not be quashed; and the question is whether the Secretary of State had any power to make the order which he did in fact make.

The applicant is a French subject who has resided in this country since 1907. During the course of the present war a branch office of the French War Ministry has been established in London, and that office issued notices to the applicant calling upon him to submit himself to the military authorities in France for service. He did not comply with those notices, and the Secretary of State made an order for his deportation with the object of sending him to France,

where he would come under the jurisdiction of the military authorities. That order was made in pursuance of the Aliens Restriction (Consolidation) Order, 1916, art. 12, which was made in pursuance of the powers conferred by the Aliens Restriction Act, 1914. It is not disputed that there was power to make the Order in Council under the statute, and the only question is whether the Secretary of State has power to make such an order for deportation as was made in this case, acting in pursuance of the regulations made under the statute.

The applicant contends that the order for his deportation ought not to have been made upon various grounds. First, he says that he is a political refugee from France. That is a question of fact, and the Attorney-General has contended on the evidence that the applicant has not shown satisfactorily that he is a political refugee. I do not intend to deal with that point. I will assume for the purpose of my decision that the contention of the Attorney-General is correct, and will therefore treat this case as that of a person who is amenable to military service under the law of our ally, France, and has been summoned to serve in France and has failed to respond to that summons. The question then is whether these facts entitle the Secretary of State to order the deportation of the applicant so that he may be sent to France and come under the jurisdiction of the military authorities there. That must depend upon the language of the statute and the Order in Council made thereunder. Looking at the statute, I come to the conclusion that there is no power under the statute or the Order, which can only derive its authority from the statute, to order the deportation of an alien to any particular country. There is undoubtedly power to order the deportation of an alien from this country; but that is very different from saying that there is power to say to which country the alien shall be deported. In my opinion this case must be decided upon the view we take as to the power to order deportation to a particular country notwithstanding that in form this order does not mention any country. In form the order is correct, but this Court must look behind the mere form, and, when there is no doubt that the intention is to deport the alien to a particular country, though the form of the order does not state that that is the object and intention of the Executive in making the order,

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we must treat it as if the order did in effect state that the alien was to be deported to France. The Attorney-General has admitted that it is the object and intention of the Executive to send this man to France and that that is the only reason why this order was made by the Secretary of State. It is not suggested that he was an unfit person to remain in this country for any other reason than that he was required to attend in France, where he is what is called an *insoumis* who has not submitted himself to the jurisdiction of the military authorities though he has been called upon to do so. Therefore, brushing aside technicalities, I have come to the conclusion that this order cannot stand. I do not think that under art. 12 of the Order Parliament has given to the Secretary of State the power to make an order which would forcibly remove an alien from this country to another country to which he does not wish to go. The alien must leave the country, and if he does not leave the country I can understand that the Executive may have the power to remove him notwithstanding that it may be to a country to which he does not wish to go; but he must have the opportunity of leaving this country when the order for deportation is made, and he may go to any country he pleases. Parliament can say that the Secretary of State shall have the extended power, but it is for Parliament to say so, and not for us sitting as a Court of justice interpreting legislation. Upon that ground, and upon that ground only, I come to the conclusion that we must deal with the substance of this case, and that, therefore, this order must be quashed. We must not, particularly when dealing with personal liberty, strain the language, and must be careful only to interpret the law reasonably and naturally according to the language used. Applying that rule of construction, I arrive at the conclusion that there was no power to make this order, and that the rule must be made absolute.

RIDLEY J. I agree. In this case the Home Secretary has made an order for the deportation of the applicant which on the face of it is a perfectly good order. Objection has been taken to it upon various grounds. One of the grounds is that it does not fall within the scope of the words which appear in the Aliens Restriction Act, 1914, as a matter which was "necessary or expedient with a view to the safety of the realm," but I give no decision upon that point

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Ridley J

to-day. The point upon which the Lord Chief Justice has given his decision is of a different kind. It seems to me that, though this order is good on the face of it, we ought to bear in mind that the real object is not the removal of the applicant from this country, but his return to France in order that he may there take up his duty of military service. If it is really meant to be carried out in such a way that against his consent and will the applicant is to be taken to France, in my opinion it cannot be supported. I think the Home Secretary has no power to name the country to which the alien is to be deported. I agree, therefore, that the proper course for us to adopt is to say that this order is bad and must be quashed.

BRAY J. I agree. Although in form this order is merely an order for deportation, it is quite clear from the admissions that in effect it is an order for deportation to France. Therefore the question which we have to consider is whether the Secretary of State has power to make an order for deportation of an alien to a particular country or place. In my opinion he has no such power. I think that art. 12 of the Order in Council upon which this question turns was clearly intra vires, that is, was quite within the power given by the Act to His Majesty by Order in Council to impose restrictions on aliens, and that though the words of art. 12 are very wide, enabling a Secretary of State to order the deportation of any alien, it does not prescribe any condition or ground upon which he may do so. The question is whether a Secretary of State is authorized to order the deportation of an alien to any particular place. Sect. 1 of the Act refers only to "the deportation of aliens from the United Kingdom," and art. 12 of the Order in Council only provides that the alien "shall forthwith leave the United Kingdom." The alien, therefore, is only bound to leave the United Kingdom, and as the order made in this case would prohibit him from leaving the country for any other place than France, in my opinion it is a bad order. That being so, the order must be quashed.

Rule absolute.

Solicitor for applicant: *H. Percy Becher.*
Solicitor for respondent: *Treasury Solicitor.*

J. H. W.

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Jan 11.

In re A DEBTOR (No. 3 OF 1909).
Ex parte GOLDSTEIN.

Bankruptcy—Examination of Witnesses—Information respecting the Dealings of the Debtor—Holder of Bills accepted by Debtor—Application to rescind Order—Appeal—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 25, *sub-s.* 1 ; *s.* 108, *sub-s.* 1.

By s. 25, sub-s. 1, of the Bankruptcy Act, 1914, the Court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it any person whom the Court may deem capable of giving information respecting the debtor, his dealings or property.

By s. 16, sub-s. 17, if under a composition or scheme a trustee is appointed to administer the debtor's property or to distribute the composition, s. 25 of the Act shall apply as if the trustee were a trustee in a bankruptcy.

By s. 108, sub-s. 1, every Court having jurisdiction in bankruptcy under the Act may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

A receiving order having been made against a debtor, a scheme of arrangement was submitted and accepted, the receiving order was rescinded, and the official receiver became the trustee under the scheme. A proof was lodged by a creditor who was the holder of certain bills of exchange drawn upon and accepted by the debtor and indorsed to a third person who transferred them for value to the creditor.

On the application of the official receiver under s. 25, sub-s. 1, an order was made by a county court for the examination of the creditor. There was no evidence that he was capable of giving any information respecting the debtor, his dealings or property :—

Held, that an order for his examination could not properly be made under the section.

Under s. 108, sub-s. 1, the creditor applied to the county court to rescind its order. That Court refused the application. On appeal to the Divisional Court against this refusal :—

Held, that the creditor had taken the proper course in applying to rescind the order, and that the order must be rescinded.

Dicta in *In re Gold Co.* (1879) 12 Ch. D. 77 and *In re North Australian Territory Co.* (1890) 45 Ch. D. 87 considered.

APPEAL from the registrar of the Peterborough County Court, who refused to set aside an order made under s. 25 of the Bankruptcy Act, 1914 (1), for the examination of a witness.

(1) Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 25, sub-s. 1 : "The Court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a

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On April 7, 1909, a receiving order was made against the debtor. At the first meeting of creditors held on May 10 one Isaac Goldstein lodged a proof for 2352*l.*, subsequently on December 22, 1914, altered to 3114*l.* 5*s.*, as holder for value of four bills of exchange, each for 1000*l.*, dated December 28, 1907, drawn by Joseph Marcus Copelevitz Josephson, accepted by the debtor, indorsed by the debtor's wife, and payable twelve, eighteen, twenty-four, and thirty months respectively after date. The title of Isaac Goldstein to these bills was complicated. The following facts in relation to it appeared from an affidavit of his solicitor :—

On July 24, 1908, Samuel Goldstein, the son of Isaac Goldstein, agreed to buy the four bills for 2500*l.* On August 31, 1908, one of these bills became the absolute property of Samuel Goldstein, and as to the others the payment of the purchase-money was postponed until January 25, 1909.

On January 21, 1909, Isaac Goldstein agreed to sell to the wife of J. M. C. Josephson certain leasehold houses in the Commercial Road for 4000*l.*, of which 1000*l.* was to remain on mortgage. On January 29, 1909, a mortgage deed securing this 1000*l.* was executed. On the same day an agreement was entered into whereby J. M. C. Josephson absolutely sold and indorsed the four bills of exchange to Samuel Goldstein, and Isaac Goldstein released the mortgage for 1000*l.* on the leasehold houses and took in exchange a charge of 2000*l.* on the bills of exchange. This agreement was executed on February 4, 1909.

On January 16, 1912, a scheme of arrangement of the debtor's affairs was submitted and accepted. On April 29, 1912, the receiving order was rescinded. The official receiver was the trustee under the scheme. On November 20, 1916, he obtained an ex parte order in the Peterborough County Court in pursuance of s. 122 of the

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debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the Court may deem capable of giving information respecting the debtor, his dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property . . . ."

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Bankruptcy Act, 1914, that the High Court of Justice in Bankruptcy should be asked to act in aid of the county court for the purpose of examining, under powers contained in s. 25 of the Act, Isaac and Samuel Goldstein as being persons capable of giving information as to the claim of Isaac Goldstein to prove for 3114*l.* 5*s.* in respect of the four bills of exchange. On November 23, 1916, summonses were served on Isaac and Samuel Goldstein to attend before Mr. Registrar Brougham on November 29, 1916, to give evidence and produce all documents in any manner relating to their dealings and transactions with the debtor. The examination of these witnesses was, however, adjourned.

On December 8, 1916, an application on behalf of Isaac and Samuel Goldstein to set aside the order of November 20 was heard before the registrar of the county court, with the result that the order was confirmed.

Isaac Goldstein appealed from this decision upon the ground, among others, that the order was oppressive and had no relation to the debtor's dealings or transactions, and that the appellant was not known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or capable of giving information respecting the debtor, his dealings or property.

W. Grist Hawtin, for the appellant. There is no evidence that the appellant is known to have, or suspected of having, in his possession any of the estate or effects belonging to the debtor, or that he is supposed to be indebted to the debtor, or that he is capable of giving any information respecting the debtor, his dealings or property. That being so, he cannot be examined under s. 25 of the Bankruptcy Act, 1914. There is no other power to examine him. The machinery of s. 25 is not to be used in aid of proceedings dehors the scheme of arrangement: *In re Franks* (1); *In re Aarons.* (2) The order of November 20, 1916, ought never to have been made. It may be that there is no appeal from that order: *Ex parte Austin.* (3) But by s. 108, sub-s. 1, of the Bankruptcy Act, 1914, "Every Court having jurisdiction in bankruptcy . . . . may

(1) [1892] 1 Q. B. 646. (2) (1914) 111 L. T. 411.
(3) (1876) 4 Ch. D. 13.

review, rescind or vary any order made by it under its bankruptcy jurisdiction." The appellant has taken the proper course in applying to the county court to reconsider the order of November 20 and in appealing from the refusal of the Court to do so.

E. W. Hansell, for the official receiver. The words of s. 25 are very wide and in practice are taken to cover every case in which information might be obtained to help the trustee or official receiver in deciding whether to admit or reject a proof. There can be no doubt that if J. M. C. Josephson had been the creditor he could have been examined. The circumstances in which the appellant and Samuel Goldstein acquired these bills give strong grounds for suspecting that they could give information respecting the debtor, his dealings and property. A witness who is ordered to be examined has no locus standi to appeal from the order: *Ex parte Austin* (1); *In re Gold Co.* (2) [*In re Moyce* (3) was also cited.]

HORRIDGE J. This is an appeal from the registrar of the Peterborough County Court, who refused to set aside an order invoking the auxiliary jurisdiction of the London Bankruptcy Court for the purpose of examining certain witnesses. The only appellant is Isaac Goldstein, and so we cannot deal in this proceeding with the order in so far as it affects other persons directed to be examined. The order purports to have been made under s. 25 of the Bankruptcy Act, 1914.

(1) 4 Ch. D. 13.

(2) 12 Ch. D. 77.

(3) (1899) Unreported. This was an appeal by the official receiver, trustee in the bankruptcy, from the registrar of the Croydon County Court, who refused to issue a summons for the examination of a witness under s. 27 of the Bankruptcy Act, 1883. The witness was a creditor upon a judgment obtained by default. The debtor said that nothing was due, but that on the contrary the creditor was indebted to the estate, and other creditors objected to the proof.

Muir Mackenzie, for the appellant.

The respondent did not appear.

WRIGHT J. The trustee is entitled to know on what the creditor's supposed judgment by default is based.

The COURT (Wright and Channell JJ.) allowed the appeal and made an order for the examination of the creditor.

Solicitor for appellant: *Solicitor to the Board of Trade.*

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Horridge J.

The first question raised was whether there was power to go to the Court below and ask to have the order discharged. This doubt arose from the language of Jessel M.R. and Baggallay L.J. in *In re Gold Co.* (1) In my opinion the language of those learned judges must be taken as referring to a right of appeal strictly so called, and not to an application to set aside an order. In *In re North Australian Territory Co.* (2) Bowen L.J. uses the following words: "Having regard to those characteristics of this section which I have touched upon, I certainly should be loth to conclude that the witness—if I may call him a witness—the examinee, the person who is to be examined and against whom or upon whom the order has been served—has not a locus standi to complain that that order is oppressive or hard upon him; . . . . it seems to me that the point ought to be left open; because, as at present advised, there are some expressions of the late Master of the Rolls and Baggallay L.J. in the case of *In re Gold Co.* (1), which seem to me at the first blush to go too far, and which seem to me indeed to be contrary to the decision in *Heiron's Case.*" (3) Sect. 108, sub-s. 1, of the Bankruptcy Act, 1914, provides "Every Court having jurisdiction in bankruptcy under this Act may review, rescind or vary any order made by it under its bankruptcy jurisdiction." Fortified by the opinion of Bowen L.J., this Court ought to hold that the appellant had power to make this application to set aside the order for his examination. The question then is whether the conditions of s. 25 have been complied with so as to justify the original order for the examination of Isaac Goldstein. The facts are these: Isaac Goldstein, the appellant, is alleged to have advanced a sum of money on the security of acceptances given by the debtor in 1907 to one Josephson. It was not suggested that the appellant had anything to do with the original making of these documents. They did not come into his possession until February, 1909, when they were indorsed to him by the holders. On December 22, 1914, a proof was tendered against the debtor's estate by the appellant in respect of the advance. The official receiver desires to examine the appellant as to the circumstances in which he took the acceptances, suggesting that he took them either when they were overdue, or with notice of an infirmity

(1) 12 Ch. D. 77. (2) 45 Ch. D. 87, 93.
(3) (1880) 15 Ch. D. 139.

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in their title, or possibly without having given value for them. But with these suspected transactions the debtor had nothing to do. It is not suggested that the appellant at the time of the making of the bills had any knowledge of the debtor's dealings with them. In these circumstances can we say that the conditions of s. 25 have been fulfilled? No one contends that the appellant is a person suspected of having in his possession any estate or effects of the debtor or supposed to be indebted to him. Is he a "person whom the Court may deem capable of giving information respecting the debtor, his dealings or property?" The official receiver argues that the appellant may be deemed capable of giving information respecting the dealings of the debtor; but there is no suggestion that he ever had any dealings with or knew at the time of taking the bills of anything done by the debtor. It seems to me, therefore, that the net laid by s. 25 is not of a kind to enclose this case. Unless it can be shown that the person tendering a proof can give some information respecting the debtor, his dealings or property, he cannot be summoned to give evidence under s. 25. The section does not say that the Court may summon before it any person making a proof, but only persons whom it may deem capable of giving information respecting the debtor, his dealings or property. Those words cannot be strained so as to include dealings by some one other than the debtor with a document previously issued by the debtor with the issue of which the proposed witness had nothing to do. In the unreported case before Wright and Channell JJ. (1) the proposed witness was a judgment creditor. Of course the trustee would be entitled to inquire into the circumstances in which the judgment was recovered. Such an inquiry relates to a dealing with the debtor direct. That case cannot be taken as deciding that s. 25 would justify the examination of every one who tenders a proof although innocent of any transactions with the debtor. I should be glad to support the registrar's order if it were possible, because I think the examination of the appellant might be useful; but we are bound by the limitations of s. 25, and there is not shown to the Court any probability that the appellant could give any information respecting the debtor, his dealings or property. The appeal must therefore be allowed and the order of the registrar set aside.

(1) See note (3), p. 561, ante.

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SHEARMAN J. It has been argued that by the practice of this Court a trustee can always obtain an order for the examination of a creditor who can throw any light upon the question whether a proof should be admitted or rejected. It might be well if such a practice could be established, but if it exists it must derive its validity from the statute. I cannot see that the statute justifies a practice described in such wide terms. The only decided case upon the point is *In re Moyce.* (1) That case has been satisfactorily explained. It does not warrant the sweeping effect ascribed to it.

In the present case the debtor raised a sum of money by means of acceptances which came into the possession of a former holder eight months after they were given and into the hands of the present holder fourteen months after they were given. The trustee in bankruptcy, being in doubt as to whether to admit or reject the claim of the present holder, desires to investigate the dealings by which the present holder acquired the bills from the intermediate holder. It is said that under s. 25 of the Bankruptcy Act, 1914, he can summon any claimant against the estate and have him examined as a " person whom the Court may deem capable of giving information respecting the debtor, his dealings or property." If the order made in this case is to stand the appellant must answer that description. As to the debtor or his dealings, it is not suggested that the appellant can give as information anything but what he has heard from other persons. The bills are in no sense the property of the debtor. If the statute had provided for the examination of any one who could give information respecting the liabilities or affairs of the debtor there would have been no difficulty. But the words of the section are not " the debtor, his liabilities or affairs " ; they are " the debtor, his dealings or property," and those words do not enable the trustee to summon and examine every claimant merely as such who acquires a right against the estate from some one other than the debtor.

The other question, namely, whether a person summoned for examination may appeal from the order when he is not a party to it, requires very short treatment. The whole practice of our Courts of justice is permeated by the principle that if an order affecting any person is made ex parte, and he is aggrieved thereby, he does not appeal from the order, but comes before the Court with a

(1) Unreported. See note (3), p. 561, ante.

summons or motion to set it aside. In the present case s. 108 of the Bankruptcy Act, 1914, expressly provides that any order may be reviewed and rescinded or varied. The appellant was aggrieved; he took the proper course in applying to set aside the order by which he was aggrieved, and which, in my opinion, was wrongly made. The appeal must be allowed and the order set aside.

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A DEBTOR (No. 3 OF 1909), *In re.* GOLDSTEIN, *Ex parte.*

Shearman J.

Appeal allowed.

Solicitor for appellant: *Raymond Burrow.*

Solicitor for official receiver: *Solicitor to the Board of Trade.*

W. H. G.

[IN THE COURT OF APPEAL.]

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MOAKES *v.* BLACKWELL COLLIERY COMPANY, LIMITED.

Employer and Workman—Practice—Minor—Recorded Agreement—Rate of Compensation varying with Current Rate of Wages and Capacity of Workman—Application for Leave to issue Execution—Jurisdiction—Fresh Application for Arbitration—Review—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58)—*Workmen's Compensation Rules*, 1913, 1914, *rr.* 82, 84.

The applicant, while under twenty-one, met with an accident while working in the respondents' colliery in 1907. Liability was admitted and compensation paid till 1911, in which year the applicant attained twenty-one. In that year an agreement was made between the workman and his father and the employers, and duly recorded, whereby the employers agreed to find the workman light employment and pay him weekly what he could earn by working pit time at such employment, and in addition half the difference between that sum and what he would have earned at the current wages in the pit if he had remained uninjured. Compensation was paid under this agreement for five years. In 1916 disputes arose between the workman and the employers as to the amount which the workman could earn in the employment provided. The workman applied for a fresh arbitration. The county court judge dismissed the application, holding that he could not grant a fresh arbitration while there was a recorded agreement on the file, and that the workman's remedy was to apply for leave to issue execution. The workman appealed.

The Court (Lord Cozens-Hardy M.R., Warrington L.J., and A. T. Lawrence J.) dismissed the appeal, holding that no fresh

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arbitration could be entered upon while the agreement was on the file; and that the Workmen's Compensation Rules, r. 82, enabled the judge to decide, on an application to issue execution, the question what sum was payable under the agreement.

They also *held* that the case was not one for an application to review, as there was no change of circumstance, and the workman did not desire to alter the agreement.

Decision of county court judge affirmed.

THE applicant in this case was a workman employed in the respondents' colliery. On October 12, 1907, while he was a minor, he met with an accident in the course of his employment which caused a compound fracture of his leg. He was wholly unable to work for about nine months, during which he received full compensation. He then started to do some light work on the roads, and after six months he went to work in the stall and worked there until January, 1910, when his leg failed him again, and he had not since been able to do any laborious work continuously. On April 11, 1911, the applicant and his father, as his next friend, entered into an agreement with the company which, as stated in the application, after reciting the accident and that the company had paid the workman the compensation to which he was entitled under the Act until June 29, 1908, when the workman returned to work as above mentioned, provided "that the company should, so far as they conveniently could do so, find and provide at their colliery employment suitable for the workman and pay him the wages which he should earn at such employment, and in addition to such wages in each week pay to the workman as compensation under the above mentioned Act half the difference between the wages which the workman could earn at such employment by working pit time and the weekly sum he would probably have been earning if he had remained uninjured, but not in any case to exceed one pound; and the workman agrees to accept such terms, such agreement to be subject to review at the request of either of the said parties subject to the provisions of clause 16 of the First Schedule to the above mentioned Act."

A memorandum of this agreement was duly recorded under clause 9 of the Second Schedule to the Act and had never been reviewed.

On October 24, 1916, the applicant commenced these proceedings

for an arbitration under the Act, alleging that he was incapable of work in default of suitable employment, and claiming compensation at the rate of 1*l.* a week as from January 26, 1916. He admitted that he had been paid weekly sums calculated according to the terms of the agreement up to that date. He did not object to the terms of the agreement, but alleged that since that date the work provided by the company had not been suitable, and that the amount of the weekly sums payable under the agreement had not been properly calculated. Certain sums had, however, been received after that date.

The respondents took the preliminary objection that as there was an agreement on the file the county court judge had no jurisdiction to proceed with the arbitration. The judge held the objection good, and dismissed the application, telling the workman his remedy was to apply to the registrar for leave to issue execution. (1)

The applicant appealed.

Ellison, for the appellant. The agreement in this case never fixed the amount of compensation at all. It only gives the workman the difference between two factors, both of which are unknown. The workman wants the amount settled, and the only way it can be settled is by a fresh arbitration. The county court judge objected that he could not make an award on arbitration while there was an agreement on the register, and advised the applicant to apply to

(1) Workmen's Compensation Rules, 1913, 1914, r. 82:

"(1.) Where a party liable to pay compensation or costs under any award, memorandum, or certificate has made default in payment of the amount awarded, or where payment is to be made by instalments, of any instalment, the party entitled to such compensation or costs may apply to the Court for leave to issue execution against the goods of the party in default.

"(2.) An application for leave to issue execution shall be made on notice in writing in accordance with the county court rules as to interlocutory applications.

"(3.) Where the application is made to the registrar he may, if no cause is shown to the contrary, and on proof of the amount in payment of which default has been made, give leave for execution to issue.

"(4.) If cause is shown to the contrary, or if the registrar is in doubt as to the proper order to be made, he may refer the matter to the judge, who may make such order or give such directions as may be just."

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the registrar for leave to issue execution. But upon such an application neither registrar nor judge can decide any question as to the incapacity of the workman: *Warren* v. *Roxburgh*. (1) The workman wants to have it decided whether the work offered him by the employers is such light work as he can do, as required by the agreement, and what he can earn at it, and also what he could now earn if uninjured at the current rate of wages.

The employers argued that the right course was to apply for a review. But on a review the Court can only review the amount of the weekly payment; here no weekly payment was fixed. A review is only justified when there is a change of circumstance. There is none, and the workman does not wish for a review.

E. W. Cave, for the respondents. The form of agreement is a very common one in the Midland colliery districts, and is very advantageous for a minor, for it enables him to get a compensation varying with his increasing age, or with a rise of current wages. The rate payable is easily ascertainable by any one familiar with the trade and district.

The registration of an agreement is equivalent to an award, and after either registration or award no new proceedings can be taken: *Watts* v. *Logan and Hemingway* (2); *Tyne Tees Shipping Co.* v. *Whitlock*. (3) Rule 82 of the Workmen's Compensation Rules gives ample means for enforcing the agreement; but if not, the agreement was put forward by the workman, and it is his own fault if he has made it unenforceable.

Ellison in reply.

LORD COZENS-HARDY M.R. This is an appeal by a workman, and it raises a point of interest and, no doubt, of importance. The workman, an infant at the time, met with an accident in 1907; liability was admitted, and payments were made for many years by the employers, and that has not been disputed. Four years after the accident, in April, 1911, an agreement was recorded in the following terms: [His Lordship read the agreement and continued:] Now that agreement I daresay is, in an organized trade like that of the colliery trade, a very reasonable agreement to be entered into.

(1) (1912) 106 L. T. 555; 5 B. W. C. C. 263.

(2) (1914) 7 B. W. C. C. 82.

(3) (1913) 6 B. W. C. C. 559.

It is easy to criticize its language; it does not seem to be in some respects happily phrased, but it has been acted upon from April, 1911, admittedly to January, 1916, and nobody desires—certainly the workman does not desire—to repudiate this agreement, or to set it aside or to review it. He says "I am entitled to an award under the Act on this ground, that you cannot, according to the true construction of that agreement, ascertain what is the amount of compensation given to me. It is a variable amount dependent on the difference between two unknown factors"—as counsel for the appellant puts it; and he says that that being so, it was right to make an original application for an award, and not one for a review.

I do not accept the argument of counsel that the proper course was to apply for a review. The workman says "I am content with this agreement; I do not want to review it at all. It is an agreement which is binding upon me; I do not want it to be supplemented by another agreement, or anything of the kind." The agreement is perfectly good, and, therefore, I think counsel for the appellant is right in saying that he will not apply for a review. By so doing he might put the employers in a position very unfavourable to the workman, for you cannot review unless you prove change of circumstances.

I see immense difficulty in having both a recorded memorandum and an award at the same time on the file. But I think there is an adequate and perfectly proper remedy open to the workman. The machinery for enforcing an award, or a recorded agreement, is identical. It is contained in the special provision made by r. 82. The point which counsel for the appellant desires to raise is this: "True I have received payments on the basis of this agreement up to January, 1916. I do not seek to reopen those payments at all; but I say that, having regard to the change in the rate of remuneration in this colliery district in January, 1916, the employers have not paid me the sum to which I am entitled on the basis of this agreement. Then what can the workman do?" I think r. 82 answers the question. [His Lordship read r. 82, sub-rr. 1, 2, 3.] It is quite clear that the workman cannot get leave to issue execution without proof of the amount due in respect of the compensation, payment of which is in default. Then it goes on to say: "(4.) If

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cause is shown to the contrary,"—that means by the employers—"or if the registrar is in doubt as to the proper order to be made, he may refer the matter to the judge, who may make such order or give such directions as may be just."

We have not got the precise figures, but by way of an illustration, suppose that the employers have been paying 8*s.* a week to the man, and the workman says "According to this agreement what I am entitled to is 10*s.* and not 8*s.*, and I ask you, the registrar, to give me leave to issue execution on the footing of 10*s.* a week." Evidence must be given, of course, as to what is the amount in respect of which there is default. If the registrar is satisfied with the evidence and does not think it necessary to refer it to the judge, he may give his decision. Should he refer it to the judge, the judge will be entitled to answer this question: Under this agreement, which is binding on both parties, is 10*s.* the amount which is payable, or is it only the 8*s.* which has been offered? Then the county court judge may "make such order or give such directions as may be just." To my mind it is quite clear he may say to the workman "I give leave to issue execution on the footing of 10*s.* a week"; and that being so, the man will get adequate relief and the proper enforcement of the award. In fact, when you remember that a memorandum of an agreement is really for all intents and purposes exactly the same as an order made by the Court, it seems to me reasonably plain that the Court must have power to enforce its own orders, and that power is expressly given, with very careful safeguards, by r. 82, sub-rr. 1, 2, 3, and 4. I think, therefore, counsel for the respondents was right in saying the amount is settled by the agreement; it is settled none the less that the precise sum may involve an adjustment. For instance, one can imagine that the terms for compensation in certain classes of employment might be so many shillings per week if the price per quarter of wheat at Mark Lane was so much, and more if that price were higher. That would be a question of fact not in the least altering the agreement between the parties. But the agreement between the parties would be enforced, making that certain which the parties by the terms of their agreement left to be adjudicated upon in a particular way.

For these reasons I think the learned judge was perfectly right in saying that the preliminary objection taken by the respondents

must prevail. It was not a case for an original application because there was no dispute at all between the parties as to what the rights of the parties were; they were ascertained by the recorded agreement. It was not a case for review because both parties were contented with the agreement, and the workman does not want to alter or change it in any way. I think his proper course is to apply for leave to issue execution on the basis which I have indicated. The appeal fails.

WARRINGTON L.J. I am of the same opinion. The workman in this case on October 11 or 12, 1907, being then an infant, suffered an injury by accident arising out of and in the course of his employment, which entitled him to compensation under the Act. On April 11, 1911, he and the employers came to an agreement for settling the amount of compensation to which he was entitled. The agreement was duly recorded pursuant to clause 9 of the Second Schedule to the Act, and thereupon, being so recorded, it became for all purposes enforceable as a county court judgment. The workman, nevertheless, in October, 1916, applied to have the compensation settled by arbitration, and he issued his request pursuant to r. 8 of the Workmen's Compensation Rules. At the hearing of the arbitration an objection was taken that, there being already on the register a memorandum of agreement settling the amount of the compensation, it was not open to the workman to apply for arbitration, inasmuch as arbitration is only to be resorted to where the question which has arisen between the parties has not been settled by agreement. The learned county court judge, as I gather from his note and from the award that he actually made, adopted that view, and, on the ground that there was an agreement already on the register, refused to make an award because it would be inconsistent with the principles on which the Act and the Rules are founded that there should be on the register at the same time an agreement and an award, both settling compensation. Some discussion seems to have arisen as to whether the workman could properly have the question settled which he desired to have settled by means of a review, and it seems to have been suggested by the employers that that would have been the proper course to pursue. I do not agree with that. I do not think it was a case in which a

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review was appropriate, because the workman did not object to the agreement; the agreement has been acted upon for five years, and he had no objection to it as an agreement. The question which has arisen is this: [His Lordship stated the agreement as to compensation and continued:] I take it that it is fairly clear on this agreement that the first of the two factors from which the amount of compensation is to be ascertained, namely, the wages which the workman could earn at such employment by working pit time, means the wages which he could earn, if he worked pit time, at such employment as is provided by the master under the foregoing stipulation on his part. The second of the two factors is the one which is adopted by the Act for the purpose of settling compensation payable to a man who was an infant at the time the accident occurred. It is to be found in clause 16 of the First Schedule to the Act, which provides as follows: "Where the workman was at the date of the accident under twenty-one years of age and the review takes place more than twelve months after the accident, the amount of the weekly payment may be increased to any amount not exceeding 50 per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding one pound." That is, for the purpose of review under the Act that criterion is adopted which has been adopted in this agreement as the second of the two factors. At first I was impressed by what appeared to be the indefinite nature of this agreement, but on consideration I do not think it is indefinite at all. I do not believe that for any one conversant with the trade in which the applicant is employed there would be any difficulty in settling either of those two factors; and when you settle that, then the amount to be paid as weekly compensation is ascertained. You have, in fact, for the purpose of enforcing this agreement to reduce into figures that which is expressed in the agreement in the form of verbal description. The question which has arisen is what in particular weeks is the amount to be paid to the workman. How is that to be settled? Not, I think, by a new arbitration, because that is inconsistent with the fact that there is already an agreement on the file. It is to be ascertained as the Act and Rules point out. The agreement is to be enforced in the same way as a county court judgment; and

r. 82 provides one mode, at all events, by which the agreement may be enforced, namely, by application for leave to issue execution, and if on that application where the workman applies a cause is shown against leave being issued for the particular amount that the workman conceives he is entitled to, means are provided by which the registrar, or if the parties do not accept his decision then the county court judge, may order execution to issue for such sum or may give such other directions as he may think just—directions, I apprehend, tending to the ascertainment of the sum for which execution ought to be issued. I see no difficulty in the question which has arisen being settled in that way; and I think the county court judge was perfectly right in refusing to make an award on this request on the ground adopted by him, there being already a memorandum, not objected to by either of the parties, on the register of the county court. I think the appeal ought to be dismissed.

A. T. LAWRENCE J. I am of the same opinion; and I am very glad to be satisfied that there is this power of enforcing this agreement. It seems to me it would be lamentable if there was an agreement which counsel for the workman says he approves of and does not wish disturbed and yet no means of enforcing it. On the other hand, it would also be lamentable if you could not have an agreement with this flexible clause in it enabling the amounts to vary with the increase in age and capacity of the man and the fluctuations in wages. These are necessary things; I mean necessary for the convenience of the employers and workmen in many classes of work, and this particular class is one of them. Therefore it is highly desirable that agreements should be capable of being recorded in this form, or something approaching this form, and that they should be capable of enforcement after they have been duly recorded. I think that the objection taken by counsel for the respondents was well founded, and that the application made by counsel for the workman was erroneous. The appeal should be dismissed.

Solicitors for appellant: *King, Wigg & Co., for Philip Bertram Mather, Chesterfield.*

Solicitors for respondents: *Ullithorne & Co., for C. F. Elliot Smith, Mansfield.*

J. R. B.

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Jan. 22, 29.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* COLPUS AND BOORMAN.

THE KING *v.* WHITE.

Criminal Law—Evidence—Statement by Accused—Statement made at a Military Court of Inquiry—Admissibility.

Rule 124 (L) of the Rules of Procedure made under s. 70 of the Army Act, 1881 (44 & 45 Vict. c. 58), which provides that "any confession, statement or answer to a question made or given at a Court of inquiry shall not be admissible in evidence against an officer or soldier . . . . ," applies only to military tribunals and does not make a statement made at a Court of inquiry inadmissible in evidence at a criminal trial in a civil Court.

APPEALS from convictions at the Lewes Assizes.

The appellants Colpus and Boorman were indicted (together with a third person who was acquitted) for conspiring to defraud the military authorities by falsely representing to the officer whose duty it was to give a cheque for the amount due to a laundry company in respect of the washing of a depot company that 33*l.* was due to the laundry company, when in fact the amount due was only 12*l.*, and to divide the surplus proceeds among them. Colpus was the secretary of the laundry company, and Boorman was a quarter-master-sergeant. Boorman obtained the cheque for 33*l.*, made payable to the laundry company. Colpus cashed the cheque and applied 12*l.* in payment to the laundry company, and the balance of 21*l.* was divided between Colpus, Boorman, and the third man. White, who was a soldier, was indicted for obtaining from the proper officer a cheque for 35*l.* by falsely pretending that that sum was due to the same laundry company for work done.

Suspicion having been aroused, a military Court of inquiry was constituted to inquire into the matter. The three appellants were invited to attend the Court of inquiry and to make any statements which they might desire to make, and they all did attend and make statements. At the trial at the assizes objection was taken to the admission of these statements in evidence, but Horridge J. overruled the objection and the statements were proved. Evidence was given

at the trial as to the circumstances under which the statements were made, which all went to show that they were free and voluntary and that no inducement of hope or fear was held out to the appellants; and the Rules of Procedure (1) made under s. 70 of the Army Act, 1881, were not referred to or mentioned.

The appellants were convicted, and each of them appealed upon the ground that the evidence of the statements made before the Court of inquiry was improperly admitted.

G. Cecil Whiteley, for Colpus. The statements made before the Court of inquiry were not admissible in evidence. A military Court of inquiry is a formal judicial Court, the evidence given before which is absolutely privileged: *Dawkins* v. *Lord Rokeby*. (2) The Rules of Procedure made under s. 70 of the Army Act, 1881, which have statutory force, by r. 124 (L) expressly provide that statements made before a Court of inquiry shall not be admissible in evidence against an officer or soldier. That provision is not confined to Courts-martial or military Courts, but is of general application to all criminal Courts. The Army Act (ss. 4 to 41) deals with civil as well as military offences, and Courts-martial are given jurisdiction over civil offences. There is, therefore, a statutory prohibition against using a statement made before a Court of inquiry as evidence against the accused in a criminal Court. It would be an extraordinary result if, the military authority having power to send an alleged offender to be dealt with by a Court-martial or by a civil Court, in the former case statements made before a Court of inquiry would not be admissible in evidence, but would in the latter case. That would be contrary to all principles of justice.

In any case, a statement made before a Court of inquiry is not admissible in evidence against the accused in a criminal Court

(1) Rule 124 (A): "A Court of inquiry is an assembly of officers directed to collect evidence, and, if so required, to report with regard to any matter which may be referred to them. . . . . (L) The proceedings of a Court of inquiry, or any confession, statement, or answer to a question made or given at a Court of inquiry, shall not be admissible in evidence against an officer or soldier, nor shall any evidence respecting the proceedings of the Court be given against any officer or soldier, except upon the trial of any officer or soldier under s. 29 of the Army Act, for wilfully giving false evidence before that Court."

(2) (1873) L. R. 8 Q. B. 255.

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unless he had been duly cautioned. It is an irresistible inference that, by reason of the provisions of r. 124 (L) and of the fact that the Court consists of officers and is a military Court, the person making a statement before that Court would be induced by hope or fear unless he was properly cautioned. It must be affirmatively proved by the prosecution that a statement was free and voluntary and that there was no inducement of hope or fear held out by any one in authority before it becomes admissible in evidence: *Reg.* v. *Thompson* (1); *Ibrahim* v. *Rex* (2); *Rex* v. *Booth.* (3) Here the presumption must be that the statements were not free and voluntary, and the prosecution have not rebutted that presumption.

Thesiger, for Boorman and White. In the circumstances of these cases there is a presumption that the statements were not free and voluntary unless a proper caution has been given. That is the reason why r. 124 (L) was made, which is really only declaratory of the common law. In the case of a Court of inquiry a caution is required for the same reason as it is required in a Court of summary jurisdiction—*Reg.* v. *Arnold* (4)—or at a coroner's inquiry: *Wakley* v. *Cooke.* (5)

Sir Gordon Hewart, S.-G., *T. Mathew*, and *Branson*, for the Crown. The rule as to statements made in judicial proceedings is that they are always admissible in evidence in a criminal Court against the person making them unless made in answer to questions which he has been improperly compelled to answer in spite of objection that the answer might tend to criminate him, or unless it is provided by statute that they shall not be admissible in evidence: *Reg.* v. *Coote.* (6) In the present case, if the proceedings before the Court of inquiry were judicial proceedings, there was no objection taken to answering any question and no compulsion. Neither is there any statutory provision that such statements shall not be given in evidence in a criminal Court. The Rules of Procedure made under s. 70 of the Army Act, 1881, relate only to the internal procedure of Courts of inquiry and Courts-martial; they do not in any way relate to or affect the rules of law or the procedure applicable to a civil Court. That appears clearly upon a consideration of those

(1) [1893] 2 Q. B. 12.
(2) [1914] A. C. 599.
(3) (1910) 5 Cr. App. R. 177.
(4) (1838) 8 C. & P. 621.
(5) (1849) 19 L. J. (Ex.) 91.
(6) (1873) L. R. 4 P. C. 599.

rules, and particularly from the exception in the latter part of r. 124 (L) with reference to the trial of an officer or soldier under s. 29 of the Army Act for perjury. That crime can, under the Army Act, be tried by a Court-martial, but it can also be tried by an ordinary criminal Court, and it would be a strange result if a statement made before a Court of inquiry would be admissible at a trial by Court-martial but not if the same offence were being tried in an ordinary criminal Court.

If these statements were not made in judicial proceedings they are prima facie admissible unless they were induced by hope or fear, and the evidence given at the trial shows that there was no such inducement: *Reg.* v. *Thompson* (1); *Ibrahim* v. *Rex* (2); *Rex* v. *Brown.* (3) These statements were therefore free and voluntary and clearly admissible in evidence against the persons making them.

Whiteley in reply. The case of *Rex* v. *Brown* (3) was wrongly decided.

Thesiger replied.

The judgment of the COURT (Viscount Reading C.J., Ridley and Bray JJ.) was delivered by

VISCOUNT READING C.J. The appellants Colpus and Boorman were convicted upon an indictment charging them with a conspiracy to defraud, and the appellant White was convicted upon an indictment for obtaining a cheque for 35*l.* by false pretences. All three appellants ask this Court to quash the convictions upon the ground that evidence was wrongly admitted of certain statements made before a military Court of inquiry. Boorman was a quartermaster-sergeant, and Colpus was the secretary of a laundry company. A cheque for 33*l.* was obtained by Boorman from the proper officer for the purpose of paying the amount which he said was due to the laundry company for the washing of a depot company. In fact only 12*l.* was due to the laundry company and was paid out of the proceeds of the cheque; the balance was divided between Colpus, Boorman, and another man.

The point which has been raised is one of some Importance and

(1) [1893] 2 Q. B. 12. (2) [1914] A. C. 599.
(3) (1903) 68 J. P. 15.

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has been elaborately and well argued. The military authorities became suspicious, and a Court of inquiry was ordered to be held and was appointed under the Rules of Procedure made in pursuance of s 70 of the Army Act, 1881. By r. 124 (A) " A Court of inquiry is an assembly of officers directed to collect evidence, and, if so required, to report with regard to any matter which may be referred to them . . . ." That Court of inquiry sat, and during its investigations statements were made which affected Boorman and might reflect upon his honesty. Thereupon, in pursuance of the provisions of the rules, Boorman was invited to come before the Court of inquiry, and when there was invited to make a statement. According to the evidence which was given on the trial of the indictment, in the main his statements were made without much questioning; he told his own story. Those statements were put in evidence at the trial although it was objected that they were not admissible. White also made statements before the Court of inquiry, and the same objection was taken on his behalf to their admission in evidence at his trial.

Now r. 124 (L) provides: [His Lordship read the rule.] Reliance was placed upon that rule in support of the appeals of all three appellants. It was contended on their behalf that upon the proper interpretation of r. 124 (L) any statement made at a military Court of inquiry cannot be used in evidence at a criminal trial in a civil Court. It is clear that statements so made cannot be admitted in evidence before a Court-martial; but the question is whether the rule is applicable to a criminal trial in a civil Court. In our judgment the rule applies only to proceedings in military tribunals and has no application to the civil Courts. It seems to us to be clear upon an examination of the rule that it was passed to deal only with military tribunals. The Army Act, 1881, conferred jurisdiction on military Courts in respect of certain criminal offences, but it did not oust the jurisdiction of the civil Courts in those cases. Rule 124 (L) purports to make an exception to the inadmissibility in evidence of statements made at a military Court of inquiry, that is, " except upon the trial of any officer or soldier under s. 29 of the Army Act for wilfully giving false evidence before that Court." In our opinion it would be a most extraordinary result if statements made at a military Court of inquiry could be used as evidence on a

prosecution for perjury before a military Court but could not be used at a trial in a civil Court for the same offence, and if the argument for the appellants is correct that must be the result. Without going further into the matter, it seems to us to be quite plain that this rule has no application whatever to proceedings in the civil Courts, but that it applies only to military Courts.

The second ground upon which the admission of this evidence has been objected to is based upon the principle laid down in *Reg.* v. *Thompson* (1), which has recently been considered in the Judicial Committee in *Ibrahim* v. *Rex.* (2) That part of the judgment in the latter case which deals with this branch of the law contains an elaborate review of the law and of the authorities bearing upon it. The law cannot, we think, be better stated than it was by Lord Sumner in delivering the judgment in that case, where he said: "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale." We do not propose to say more in this case than that the principle laid down in *Reg.* v. *Thompson* (1) and approved in *Ibrahim* v. *Rex* (3) is the principle which is to be applied in the present case. It has been argued here that the statements in question were induced by fear or hope held out by a person in authority, because the accused soldiers were subject to martial law and made their statements before a Court of inquiry which consisted of officers and were bound by and must be presumed to have known the regulations applicable, that they must be treated as if they entered the Court of inquiry in answer to an invitation by a person in authority and with the promise or fear of future advantage or prejudice, and that their statements must therefore be treated as having been made in the circumstances described in the passage which I have read from the judgment in *Ibrahim* v. *Rex.* (3) That argument, however, has no foundation at all in fact. The regulations were not referred to at the trial, and this point

(1) [1893] 2 Q. B. 12. (2) [1914] A. C. 599, 609.
(3) [1914] A. C. 599.

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was only discovered when the case came before this Court, and r. 124 could not have been in the minds of the soldiers and induced them to make statements before the Court of inquiry. It is a purely artificial argument and is not supported by the facts. It has been further argued that this case comes within the principle laid down in *Reg.* v. *Thompson* (1) because the soldiers were before a tribunal of officers who were persons in authority over them, and that it must therefore be presumed that they were induced by hope or fear. That again is a question of fact, and the only evidence relating thereto given at the trial was that there was no such inducement. That being so, we cannot come to the conclusion that these statements were not free and voluntary. For these reasons we think that the appeals must fail.

Appeals dismissed.

Solicitor for the Crown : *Director of Public Prosecutions.*

Solicitors for Colpus : *Triggs Turner & Hart, Guildford.*

Solicitor for Boorman and White : *Registrar of Court of Criminal Appeal.*

(1) [1893] 2 Q. B. 12.

J. H. W.

[COURT OF CRIMINAL APPEAL.]

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Feb. 5, 6.

THE KING *v.* JOHN NOAKES.

Criminal Law—Witness—Too Ill to Travel—Admissibility of Deposition —Evidence—"Any credible witness"—Indictable Offences Act, 1848 (11 & 12 *Vict. c.* 42), *s.* 17.

Sect. 17 of the Indictable Offences Act, 1848, provides that, if upon the trial of an indictment it shall be proved (inter alia) by "any credible witness" that a person whose deposition shall have been taken before a justice is "so ill as not to be able to travel," the deposition may be read as evidence in the prosecution :—

Held, that the credible witness need not be a medical man.

Reg. v. *Stephenson* (1862) L. & C. 165 followed.

Reg. v. *Welton* (1862) 9 Cox, C. C. 296 considered.

Appeal against conviction.

The appellant was indicted at the West Kent Quarter Sessions under s. 7 of the Prevention of Crimes Act, 1871, and was convicted. The proof of the offence depended upon the evidence of two police constables, Eades and Bates. George Baker, detective-inspector of the Metropolitan Police, called by the prosecution, gave evidence to the following effect: —He was present at Penge Petty Sessions on October 24. He heard the evidence then given by Eades and Bates. That evidence was read over to and signed by them in the witness's presence. The prisoner was present and had an opportunity of asking questions. The witness stated that he had since seen both those witnesses in bed, in the presence of a doctor whose certificates the witness had ; and that they were both so ill as not to be able to travel. The depositions of Eades and Bates were then read to the jury and put in. (1)

(1) The Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 17, after providing for the examination of witnesses before justices in the presence of an accused person charged with an indictable offence, provides that "If upon the trial of the person so accused as first aforesaid it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining

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Roome, for the appellant. Sect. 17 of the Indictable Offences Act, 1848, requires proof by a credible witness that a witness is too ill to travel before the witness's deposition can be admitted in evidence. The evidence of a police constable is not by itself sufficient for this purpose: see *Reg.* v. *Welton* (1), where Byles J. said that to make a deposition admissible "there should be the evidence of a medical man upon oath, or other evidence upon oath, which the Court might think of equal value to sworn medical testimony." That means that if the evidence is not given by a medical man there must be proof by some person who can say of his own knowledge that the witness is too ill to travel. In the present case the police officer proved no more than that he had seen the witnesses in bed. That is not sufficient, and the depositions should not have been admitted.

[BRAY J. referred to *Reg.* v. *Stephenson*. (2)]

In that case the evidence was given by a brother of the woman in question and also by her servant, both of whom were in constant association with her, that "she was daily expecting her confinement and was poorly otherwise." There was clearly, therefore, evidence which the Court was entitled to treat as of equal value to medical testimony. On the other hand, in *Reg.* v. *Butcher* (3) Darling J. declined to act on the sole evidence of a police constable that a woman was apparently very close indeed to her confinement.

Pitman (*Valetta* with him), for the Crown, was not called upon to argue.

The judgment of the COURT (Viscount Reading C.J., Ridley and Bray JJ.) was delivered by

RIDLEY J. In this case the appellant was indicted under s. 7 of the Prevention of Crimes Act, 1871. The proof of the offence depended in part upon the evidence of two police constables, Eades

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the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same."

(1) 9 Cox, C. C. 296, 297.

(2) L. & C. 165.

(3) (1900) 64 J. P. 808.

and Bates. The question which arises on this appeal is whether the proof that these two witnesses were so ill as not to be able to travel to the trial was sufficient to justify the Court of quarter sessions in allowing their depositions to be read as evidence under the provisions of s. 17 of the Indictable Offences Act, 1848. Inspector Baker was called as a witness by the prosecution, and gave evidence as follows:—"(Q.) Were you present at Penge Petty Sessions on October 24, 1916? (A.) I was. (Q.) Did you hear evidence given by Police Constable Eades and Detective Bates? (A.) Yes. (Q.) Was that evidence read over to the witnesses and signed by them in your presence? (A.) It was. (Q.) Was the prisoner present and did he have the opportunity of asking questions? (A.) Yes. (Q.) Have you since seen these two witnesses in the presence of Dr. Bray? (A.) Yes. (Q.) Are they either of them able to be here to-day? (A.) No, sir, I produce certificates. (Q.) You have the certificates of the doctor whom you saw in the presence of the witnesses? (A.) They were both in bed in the presence of the doctor. (Q.) You say with regard to each of them that they were both so ill as not to be able to travel? (A.) Yes. (Q.) You have as a matter of fact the certificates of the doctor? (A.) Yes." Upon that evidence the Court of quarter sessions admitted the depositions of Eades and Bates under s. 17 of the Act of 1848. It has been contended for the appellant that the depositions were not admissible on the ground that there was no satisfactory proof that the deponents were so ill as not to be able to travel and that the evidence ought to be that of a medical man. We do not think that that contention is correct. The statute does not require that a medical man should give evidence. [The learned judge read s. 17.] There is nothing in that section about medical testimony, and therefore it was not necessary that a medical witness should have been called in the present case. On the other hand, the evidence must be evidence upon which the Court can rely; it is not sufficient to call a witness to state that he has been informed that the deponent is so ill as to be unable to travel. That is clear from the case of *Reg.* v. *Welton* (1), decided by Byles J. at the Central Criminal Court in 1862, which was cited on behalf of the appellant. In that case the evidence was that of a police constable who said: "I know Police Constable Samuel

(1) 9 Cox, C. C. 296, 297.

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King, and saw him this morning in his bed. He has fever. I have a certificate here. He has been confined to his bed about a fortnight, and the divisional surgeon, Mr. Tenby, is attending him; he is not able to get up yet." The judge asked him, "Do you know of your own knowledge that he has been confined to his bed a fortnight?" and the answer of the police constable was, "No; only from what somebody has told me. I saw him this morning, and yesterday morning; he was in bed. I had not seen him till yesterday since he has been ill." Upon that evidence Byles J. said: "I am of opinion, that to make this deposition admissible, there should be the evidence of a medical man upon oath, or other evidence upon oath, which the Court might think of equal value to sworn medical testimony." That case appears to us to have turned upon the fact that the police constable called to prove the illness of the absent witness did not know of his own knowledge sufficient facts to be able to give such evidence, or to enable the Court to rely upon his evidence. The case must not be taken as an authority for the proposition that a medical man must always be called to prove the illness of an absent witness in order to make the depositions of such witness admissible in evidence. If the case did purport to decide that, it would be in conflict with the decision of the Court of Crown Cases Reserved in *Reg.* v. *Stephenson* (1) in the same year. In giving judgment in that case Erle C.J. said: "The question reserved in this case is, whether the deposition of the prosecutrix, duly taken by the magistrates, was admissible in evidence under 11 & 12 Vict. c. 42. By s. 17 of that statute, before the deposition can be read as evidence, it must be proved, by the oath or affirmation of any credible witness, that the person whose deposition is proposed to be read is dead, or so ill as not to be able to travel. The evidence in this case was that of the brother of the woman, that she was daily expecting her confinement, and was poorly otherwise, and therefore too ill to travel from her place of residence to the place of trial, a distance of about twenty-five miles. . . . . We are all of opinion that the question, whether the illness proved is or is not within the statute, is a question for the determination of the presiding judge; and that if to his mind, exercising his discretion upon the facts proved, the evidence of illness is sufficient, this Court

(1) L. & C. 165, 166.

ought not to interfere with his decision. Speaking for myself only, I may add that in my opinion the Court of quarter sessions acted rightly in receiving the deposition in this case." Applying that rule in the present case, we think it impossible to say that the Court of quarter sessions was wrong in admitting this evidence. It was not merely evidence as to what the constable had been told; it was the evidence of a man who was able to speak to the deponent's being in bed and unable to travel because he had been in the room, where they were both in bed, in the presence of the doctor. It was therefore open to the Court to say that it had been proved by the evidence of a credible witness that the witnesses were so ill as to be unable to travel, and their depositions were rightly admitted in evidence.

This appeal therefore fails, and the conviction must be affirmed.

Appeal dismissed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*
Solicitor for the Crown: *Director of Public Prosecutions.*

F. O. R.

C. A.

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Jan. 19.

[IN THE COURT OF APPEAL.]

JOHNSTON *v.* BRAHAM & CAMPBELL, LIMITED.

Principal and Agent—Untrue Statement negligently made by Agent to Principal—Loss suffered by Principal.

Judgment of the Divisional Court [1916] 2 K. B. 529 dismissing an appeal from a county court affirmed upon the ground that there was evidence upon which the county court judge could award the plaintiff the sum of 20*l.* for her loss of time.

Appeal from the judgment of a Divisional Court (Rowlatt and Sankey JJ.) dismissing an appeal from the Westminster County Court; reported [1916] 2 K. B. 529.

The facts are stated in the report of the case in the Court below. It is sufficient to state them shortly as follows:—The action was brought by the plaintiff, an actress, to recover damages for negligence and breach of duty owed by the defendants, who were theatrical agents, as her agents in connection with the making of a contract dated October 19, 1915, between the plaintiff and the proprietors of the Palace Music Hall, Northampton. Under the contract the plaintiff was entitled to 60 per cent. of the takings at the music-hall for the week commencing November 29, 1915, she undertaking to pay the salaries of certain artists amounting to 60*l.* for the week. The plaintiff alleged (so far as material) that the defendants by their manager represented to her that the weekly takings of the music-hall were not less than 250*l.*, and that she was thereby induced to enter into the contract. The plaintiff in performance of the contract took her company to the Palace, Northampton, and performed there for the week commencing November 29, 1915. The takings were only 68*l.* 11*s.* 7*d.* The county court judge found that the defendants honestly, but without taking sufficient care, made the statement alleged, and that the plaintiff was thereby induced to enter into the contract. He awarded her 35*l.* 13*s.* for out-of-pocket expenses of bringing her company to Northampton and 20*l.* in addition. The Divisional Court were of opinion that there was evidence of negligence, and that the 20*l.* was given for loss of time, and not for loss of profits which the

plaintiff would have made had the representation been true. They accordingly dismissed the appeal, giving leave to appeal.

Patrick Hastings and *Wallington*, for the defendants. There was no evidence before the county court judge upon which he could find that the defendants were negligent. Next, if there was negligence, the county court judge, besides giving the plaintiff out-of-pocket expenses, as to which no question arises, gave her 20*l.* for loss of the profits which she would have made at Northampton if the defendants' statement as to the takings had been true. He could not do that. It is admitted that damages for loss of time would be recoverable if there was any evidence in support thereof, but there was no such evidence. [*Cassaboglou* v. *Gibb* (1) and *Salvesen & Co.* v. *Rederi Aktiebolaget Nordstjernan* (2) were referred to.]

Hawke, *K.C.*, and *E. F. Lever*, for the plaintiff, were not called upon.

SWINFEN EADY L.J. This is an appeal by the defendants from the decision of the Divisional Court dismissing an appeal from the Westminster County Court. The action is brought by the plaintiff against the defendants, who are theatrical agents, to recover damages for breach of duty to her in not exercising reasonable skill and diligence in a matter of business which they were carrying out for her, namely, in procuring an engagement for her at a music-hall at Northampton. Her case is that she was led into making the engagement owing (so far as material) to a statement made to her by the defendants which was untrue, and that the defendants did not take reasonable care to ascertain whether the statement was or was not true. She says that she was told that the weekly takings at the music-hall were not less than 250*l.* Under the contract with the proprietors of the music-hall she was to receive 60 per cent. of the takings. The defendants denied that they made the statement. The county court judge found that issue in favour of the plaintiff, and he came to the conclusion that the defendants had not used reasonable care and skill in advising the plaintiff in the matter. As in my opinion there was evidence to support the county court judge's finding of fact, no appeal lies in respect thereof. The only

(1) (1883) 11 Q. B. D. 797. (2) [1905] A. C. 302.

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Swinfen Eady L.J.

question is as to the damages. It is not denied that the plaintiff is entitled to her out-of-pocket expenses. These she proved to the amount of 35*l.* 13*s.* The county court judge gave her a further sum of 20*l.* The Divisional Court came to the conclusion that this sum was given as compensation for her loss of time in going to Northampton and performing there. There was evidence before the county court judge as to other engagements which she had, and so he had evidence before him as to the value of her time. There was evidence, therefore, upon which he could award her this sum of 20*l.* for her loss of time. No question of principle is involved in this case. The appeal must be dismissed.

BANKES L.J. I agree. I do not see why an appeal was allowed on so small a matter.

SCRUTTON L.J. I am of the same opinion. I agree with what Bankes L.J. has said.

Appeal dismissed.

Solicitors for plaintiff: *Roberts, Seyd & Co.*
Solicitors for defendants: *Wingfield, Blew & Kenward.*

W. F. B.

RHYMNEY IRON COMPANY *v.* GELLIGAER DISTRICT COUNCIL.

1917
Jan. 26, 30.

Public Health—Nuisance—Notice to abate—Person responsible for Nuisance "cannot be found"—Notice to Owner of Premises on which Nuisance exists—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 94.

The Public Health Act, 1875, s. 94, provides that "the local authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act default or sufferance the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises requiring him to abate the same . . . ."

The drain connecting a house, occupied by a tenant, with the sewer became clogged so that the sewage would not pass through. There was nothing to show what caused the stoppage. The local authority served a notice to abate the nuisance upon the owner of the house, under s. 94, and took proceedings against him for non-compliance therewith. The magistrate found as a fact that the person by whose act, default, or sufferance the nuisance arose could not "be found," and held that the local authority could proceed against the owner :—

Held, that, there being nothing to show what caused the stoppage of the drain and the consequent nuisance, the magistrate could properly find that the person by whose act, default, or sufferance the nuisance arose could not "be found," within the meaning of s. 94, and that the local authority were therefore entitled to serve the notice upon the owner of the premises and to proceed against him.

Case stated by the stipendiary magistrate for Merthyr Tydfil.

The respondents, the Gelligaer District Council, preferred a complaint at petty sessions, under s. 94 of the Public Health Act, 1875, against the appellants, the Rhymney Iron Company, as the owners of three houses upon which a nuisance existed, for having unlawfully failed to comply with a notice to abate the nuisance. The houses in question were owned by the appellants and occupied by separate tenants. Each house was drained by a separate drain into a sewer vested in the respondents. The drains carried the slop waters therefrom, and, in the case of one house, the sewage from a water-closet. The drains became clogged up so that the

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slop water or sewage would not pass through. There was nothing to show what caused the stoppage. In the past the drains had been cleansed by the appellants, the last occasion being about twelve months before the hearing of this complaint and after notice had been served on them by the respondents. On November 10, 1916, the sanitary inspector of the respondents served a notice upon the appellants, addressed to them, to abate the nuisance arising from the stopped drain and for that purpose to open and cleanse the same. On November 16 the appellants wrote to the respondents suggesting that the respondents should open the drain in order to ascertain whether there was any structural defect, and on December 9 a further letter to the same effect was written, intimating that if the nuisance was due to any structural defect the respondents would pay for abating the nuisance. The appellants did not comply with the notice of November 10.

The respondents contended that under s. 94 (1) of the Public Health Act, 1875, it was impossible in this case to ascertain the person by whose act or default the nuisance arose, and that s. 94 gave the respondents a choice of serving the notice in this case either on the owner or on the occupier, because the person responsible could not "be found."

The appellants contended that the fact that no person had ascertained whether the nuisance arose or continued by reason of an act, default, or sufferance of the owner or of the occupier did

(1) 38 & 39 Vict. c. 55, s. 94: "On the receipt of any information respecting the existence of a nuisance the local authority shall, if satisfied of the existence of the nuisance, serve a notice on the person by whose act default or sufferance the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose: Provided:—

"First:—That where the nuisance arises from the want or defective construction of any structural convenience, or where there is no occupier of the premises, notice under this section shall be served on the owner.

"Secondly:—That where the person causing the nuisance cannot be found and it is clear that the nuisance does not arise or continue by the act default or sufferance of the owner or occupier of the premises, the local authority may themselves abate the same without further order."

not render the person by whose act, default, or sufferance the nuisance in fact arose or continued incapable of being found, and that the notice was for that reason invalid.

The magistrate found as a fact that the person by whose act, default, or sufferance the nuisance arose or continued could not be found, within the meaning of s. 94, and held that the respondents were entitled to proceed against the appellants as owners. The questions for the opinion of the Court were: (1.) Whether there was evidence to support the finding of fact; and (2.) whether the magistrate was right in his interpretation of s. 94.

Macmorran, K.C., and *R. A. Glen*, for the appellants. The owner of the land on which a nuisance arises is not the person primarily responsible for it under s. 94 of the Act. The first person responsible is the person by whose act, default, or sufferance the nuisance arises or continues. If that person cannot be found, then is the time to consider the case of the owner or occupier. This is clear both from the principal enactment and from the second proviso. Speaking of a proviso in identical terms Lord Coleridge C.J. in *Thames Conservators* v. *Port Sanitary Authority of Port of London* (1) said: "The plain meaning of that proviso is that before the liability of the owner or occupier arises, it must be impossible to find the maker of the nuisance, and the nuisance must continue by the act, default, or sufferance of the owner or occupier." Before either the owner or occupier can be charged, at least reasonable means must be taken to discover the person by whose act, default, or sufferance the nuisance has arisen. The local authority have ample power on their own motion under s. 102, on the application of a third person under s. 41, to enter premises and discover the cause of a nuisance. In the present case there is no evidence that the least effort has been made to discover the person primarily responsible.

The nuisance may be due to a merely temporary obstruction of a drain, in which case the occupier, and not the owner, is primarily liable: *Russell* v. *Shenton*. (2) By the first proviso to s. 94 the owner is only responsible in case of structural defects. But again, there is no evidence of any attempt to ascertain the cause of the

(1) [1894] 1 Q. B. 647, 654. (2) (1842) 3 Q. B. 449.

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nuisance. The cases of *Gebhardt* v. *Saunders* (1) and *Andrew* v. *St. Olave's Board of Works* (2) do not really affect this case. The former case only decides that under s. 11, sub-s. 1, of the Public Health (London) Act, 1891, an occupier may recover from the owner expenses which he has been compelled to pay and for which the owner is liable; and the latter case simply follows the decision in the former. It is not sufficient for the local authority to show merely that a drain is stopped up and there is a nuisance in order to entitle them to serve notice on the owner of the premises; they must go further and prove that the stoppage is due to some structural defect. Until the drain has been opened or some other means taken to ascertain the cause of the stoppage it cannot be said that the person causing the nuisance cannot be found within the meaning of s. 94. The liability to abate a nuisance is prima facie upon the occupier of the premises: *Richmond Union* v. *Dean, &c., of St. Paul's.* (3) The last part of s. 98 shows the hardship that may be imposed upon the owner by such proceedings as these if he is not in fact the person responsible. Any remedy he may have against the occupier or other person really liable may be of no avail, for, although he may have a good cause of action, he may be unable to recover any of the expense which he has incurred.

C. Herbert Smith, for the respondents. The finding of fact that "there was nothing to show what caused the stoppage" is sufficient to support the finding that the person responsible could not "be found" within the meaning of s. 94. The words "cannot be found" are satisfied if the local authority, acting reasonably, cannot tell who is responsible for the nuisance, and in the case of a drain like this, if on looking at it there is nothing to show what has caused the stoppage, it can reasonably be said that the person responsible cannot be found. The judgments in *Gebhardt* v. *Saunders* (1) and *Andrew* v. *St. Olave's Board of Works* (2) are direct authorities for that proposition; and the latter case shows that when in such circumstances a notice has been served on the owner an order can be made against him if he does not comply with it. If the local authority have acted reasonably and properly in coming to the conclusion that the person responsible for the

(1) [1892] 2 Q. B. 452. (2) [1898] 1 Q. B. 775.
(3) (1868) 18 L. T. 522.

nuisance cannot be found, that is a question of fact for them to determine, and notice to the owner is a valid notice. It is not true to say that the liability for such a nuisance is always upon the occupier. *Russell* v. *Shenton* (1) is not an authority for that general proposition; it was decided only upon the special facts and circumstances in that case.

VISCOUNT READING C.J. The question raised in this case is one of some importance to owners and occupiers of property. The Rhymney Iron Company are the owners, but not the occupiers, of certain premises. The local authority, having ascertained that the drains in certain premises were clogged and stopped, and that there was nothing to show what caused the stoppage, served a notice upon the company, as the owners, to abate the nuisance under s. 94 of the Public Health Act, 1875. The appellants contended that it was a condition precedent to any obligation upon them that it should be established that the person causing the stoppage of the drain could not be ascertained, and that, in order to establish that, the local authority must show that they had taken at least reasonable steps to discover the cause of the stoppage. There is no doubt that under this statute, which consolidates older statutes which used the same language as that now under discussion,—that is, "cannot be found"—this notice may be served "on the owner or occupier." The appellants' contention is that it is essential that the local authority shall have taken some reasonable steps to ascertain the cause of the stoppage, such as passing a rod through the drain or opening it, before the magistrate can find as a fact that the person responsible "cannot be found." If that is the right view of these words, the appellants are right. On the other hand, it is said the true meaning of these words is that if the person cannot be ascertained in the then state of knowledge, that is, if the local authority are unable to determine whether the nuisance arises from misuse by the occupier or from a structural defect, and although the local authority has the power under various sections of the Public Health Act, 1875, to take such steps as may be necessary, there is no obligation upon them to do so before serving the notice and seeking to make the owner liable.

(1) 3 Q. B. 449.

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Viscount Reading C.J.

This question depends on whether or not we think there is an obligation imposed by the statute upon the local authority to take reasonable steps to ascertain in the sense which I have indicated. There is great force in the argument for the appellants that the owner ought not to be put under this liability and ought not to be called upon to defend himself unless a prima facie case has been established against him. With that, of course, we must agree; but when it is said further that on the facts as found here we must decide in the owners' favour, because the local authority have not discharged the obligation upon them of taking such steps as I have indicated, I think the argument goes further than the language of the section warrants. One must bear in mind in construing this section the aim and purpose of these statutes. They were designed for the protection of the public to safeguard them against nuisances which may arise and if not abated may cause illness or, at any rate, serious disturbance and discomfort in the locality, and in the state of mind which prevailed in the Legislature during the years in which the various statutes, which were consolidated in 1875, were passed it was determined that the local authority should have power, when they have discovered there is a nuisance, to step in at once for the protection of the public; and all that has to happen in order to enable the local authority to step in is that they must be satisfied that there is a nuisance, and that in the then state of knowledge they have not been able to ascertain who is responsible without putting into force the powers given by this statute of entry, search, opening up, &c. If the aim and purpose of the Act are kept well in mind, it seems to me that it follows, as was said by Day J. in *Gebhardt* v. *Saunders* (1) and approved by Lord Russell C.J. in *Andrew* v. *St. Olave's Board of Works* (2), "common sense and the necessity of the case made it necessary for something to be done forthwith." To my mind that is the key to this Act, and to the powers given under these statutes. We have been pressed in argument with the hardship that will be imposed on the owners if we affirm the decision of the magistrate, and at first sight it had some weight with us, but upon consideration and reference to the sections I find no hardship. Suppose the owner is served, and in truth the

(1) [1892] 2 Q. B. 452, 456. (2) [1898] 1 Q. B. 775, 781.

defect is one of misuse for which the occupier is really liable and is not a structural defect for which the owner is made directly liable under the statute, the mere fact of the service of the notice upon the owner does not create liability. He may resist it. The next step to be taken is for the local authority to proceed against him for not abating the nuisance. He can then prove before the magistrate that the nuisance is not due to a structural defect, or circumstances which show that he is not the person who is liable, but the occupier, and thereupon an order cannot be made against him. If, on the other hand, he chooses to stand aside and takes no notice, but allows an order to be made upon him, then no doubt it may be that a penalty can be imposed upon him under s. 96. But suppose that the order has been made upon him because he has not resisted it and it turns out that he is not really liable, he can still recover by suing the person who is ex hypothesi liable, as was done in *Gebhardt* v. *Saunders* (1) and also in *Andrew* v. *St. Olave's Board of Works*. (2) In many cases no doubt he would not be able to recover the money, even if he recovered judgment, but the remedy for that is not to allow the order to be made on him, but to meet it at once when the summons is served, and to show the facts which would entitle him to succeed on that summons. For these reasons I am of opinion that the magistrate was right in the view which he expressed, and upon the facts as stated in this case, more particularly that there was nothing to show what caused the stoppage, I think there was evidence in law to support the finding of fact that the person could "not be found" within the meaning of s. 94. Therefore this appeal fails.

RIDLEY J. I am of the same opinion. I think that in construing this somewhat difficult section one must not forget that the real object of the statute is not to put upon the local authority the duty of finding out who in the ultimate result is the person responsible for the nuisance; the object is, as it appears to me, that they should by all means possible procure that such a nuisance should be abated. It is only up to a certain point that the duty of inquiry is put upon them. If they are "satisfied of the existence of a nuisance" they may serve a notice "on the person by whose act,

(1) [1892] 2 Q. B. 452. (2) [1898] 1 Q. B. 775.

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default or sufferance the nuisance arises or continues." That is the first alternative. I think that refers to the case in which by inspection, by looking, by going to see, it is apparent by whose act, default, or sufferance the nuisance is being caused. It cannot, I think, be intended, if the object of the statute is the speedy abatement of nuisances, that on the local authority who has the duty to abate them should be put the duty of running rods through drains, or taking such means as inspectors of nuisances are obliged to take in order to find out where the defect is. I cannot think that that was the intention of the Act. I am therefore satisfied that s. 94 means that if on such inspection the local authority cannot discover upon whom the notice should be served, then, to use its words, "the person cannot be found" and notice may be served on the owner or occupier. In the present case there was an underground drain and the local authority did not know whether the stoppage arose from defect of construction or misuse. They could not tell unless by an inspection which might be a very lengthy and difficult one to make. In such a case it appears to me that the statute has given the local authority the right to serve the notice on the owner or occupier of the premises as they think fit; indeed, it might be done by serving both, for which there is authority in the case of *Gebhardt* v. *Saunders*. (1) On the other hand, it may be served on the owner by name or on the occupier by name. As my Lord has pointed out, that might be regarded as a hardship, because it is putting on the man who in the ultimate result may be found not to be liable an obligation to obey the terms of a notice requiring him to do particular work. It appears to me there must be some hardship in the case somewhere, but in a case like this with which we are dealing it is somewhat modified by remembering that the person served with the notice, in this case the owner, may appear before the justices and show by evidence that he is not responsible, but that the occupier is. It may be even then that a wrong order might be made. It is quite possible, of course, that the justices would not properly decide on the evidence. That again is properly a hardship that may be put upon him; but then if he has to do the work he may find out and prove conclusively that it was not

(1) [1892] 2 Q. B. 452.

owing to the faulty construction of the drain but to the mere misuse by the occupier that the obstruction had occurred. In such a case ultimately he can recover from the occupier. I am aware, as Mr. Macmorran contends, that this may be an insufficient remedy; but that is the state of things. I think upon the whole that, having regard to the object of the statute, we must allow that there is that element of hardship on the owner, with those elements of relief on which he is entitled to reckon.

For these reasons I agree that the construction of the statute is that which the Lord Chief Justice has declared.

LORD COLERIDGE J. The whole case turns on what is the meaning of the words "cannot be found." I do not think that the opening of the drain or the execution of the works which the statute enables the local authority to do is a condition precedent to inability to find "the person by whose act, default or sufferance the nuisance arises or continues." The object of the Act is to give power to cause the abatement of nuisances with as much dispatch as possible in the public interest, leaving the liability which is not concluded by the service of the notice to be determined when the magistrates are called upon to confirm or refuse the order applied for by the local authority. I am of opinion that it is sufficient to satisfy the meaning of the words "cannot be found" "if on inspection," to use the language of Charles J. in *Gebhardt* v. *Saunders* (1), "the cause of the nuisance cannot be found." That does not imply the execution of works. When once on inspection it is not possible to say clearly whether occupier or owner is responsible, the local authority may serve notice on the owner or occupier, or either of them, to abate the nuisance. The question of ultimate liability can be raised, if disputed, before the magistrates, and the person served can obtain his remedy against the local authority if he succeeds. If he does not dispute the liability, but some other person is liable, he can recover against such person. It is true that prima facie in the case of a stopped drain the occupier is responsible, but to hold that this means that the occupier is "found," within the meaning of the Act, as the person responsible in the case of a stopped drain would be to make invalid the provisions of s. 94.

(1) [1892] 2 Q. B. 452, 458.

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It is a good point to raise when the question of liability is contested. For these reasons I agree that this appeal must fail.

Appeal dismissed.

Solicitors for appellants: *Beamish & Co., for Gwilym James & Co., Merthyr Tydfil.*

Solicitors for respondents: *Wrentmore & Son, for Frank James & Sons, Merthyr Tydfil.*

J. H. W.

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Jan. 19.

ORMISTON *v.* GREAT WESTERN RAILWAY COMPANY.

[1916 O. 721.]

Master and Servant—Railway Company—Liability for Acts of Servants—Implied Authority—Arrest of Passengers—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 103, 104—*Regulation of Railways Act*, 1889 (52 & 53 *Vict. c.* 57), *s.* 5—*Statute Law Revision Act*, 1892 (55 & 56 *Vict. c.* 19).

The power given to railway companies by ss. 103 and 104 of the Railways Clauses Consolidation Act, 1845, to arrest passengers for travelling without having paid the proper fare with intent to avoid payment thereof was determined by the passing of the Regulation of Railways Act, 1889, the code contained in ss. 103 and 104 of the Act of 1845 with regard to that offence being replaced by the code contained in s. 5 of the Act of 1889, under which there is only a power of arrest if a passenger refuses to give his name and address after having failed to produce a ticket and to pay his fare.

The plaintiff was the holder of a first-class season ticket between certain stations upon the defendants' railway. Upon the plaintiff's arrival at a station at which the ticket was available, after he had passed the ticket barrier and had shown his ticket to a ticket collector but before he had reached the exit from the station, a porter in the employment of the defendants took him by the arm and in the presence of other persons charged him with having travelled first class with a third-class ticket. In an action against the defendants for assault, false imprisonment, and slander:—

Held, that, the offence of travelling without a proper ticket not being punishable by imprisonment, the claim in respect of the slander would not lie in the absence of proof of special damage.

Michael v. *Spiers & Pond* (1909) 101 L. T. 352 and *Hellwig* v. *Mitchell* [1910] 1 K. B. 609 followed.

Held, further, that, as the defendants had no power to arrest the

plaintiff for the offence with which the porter charged him, they could not be taken to have impliedly authorized the porter to arrest him, and that the action must be dismissed.

Poulton v. *London and South Western Ry. Co.* (1867) L. R. 2 Q. B. 534 followed.

ACTION tried before Rowlatt J. without a jury.

The action was brought to recover damages for assault, false imprisonment, and slander.

The plaintiff was the holder of a first-class season ticket on the Great Western Railway between Westbourne Park and Hanwell, and gave evidence to the effect that on July 31, 1916, after he had passed through the ticket barrier at Westbourne Park Station and had shown his ticket to a woman ticket collector but before he had reached the exit from the station, a porter in the employment of the railway company came up to him, took him by the arm, and said "I want you," dragged him back to the ticket collector, and said, in the presence of about 200 persons, "You have been travelling first class with a third-class ticket." The ticket collector said "He has a first-class ticket."

A. Neilson, for the plaintiff.

Schiller, K.C., and *Barrington-Ward*, for the defendants. The plaintiff has made out no case. He has not proved that the porter had any express authority from the defendants to arrest passengers travelling by a superior class to that for which they have a ticket. Nor had the porter any implied authority, for the arrest was outside the powers of the railway company itself. Sect. 103 of the Railways Clauses Consolidation Act, 1845 (1), which created the offence of fraudulently travelling without having paid the proper fare, and s. 104, in so far as it gave railway companies power to arrest for that offence, were repealed by the Statute Law Revision Act, 1892, and ss. 103 and 104 of the Act of 1845 were, so far as they were repealed, replaced by s. 5 of the Regulation of Railways Act, 1889. A servant of a railway company has no implied authority to do an act which the company itself has no power to do: *Poulton* v. *London and South Western Ry. Co.* (2); *Goff* v. *Great Northern Ry. Co.* (3);

(1) See note on p. 604, post. (2) L. R. 2 Q. B. 534.
(3) (1861) 3 E. & E. 672.

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Edwards v. *London and North Western Ry. Co.* (1); *Allen* v. *London and South Western Ry. Co.* (2); *Bayley* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (3); *Moore* v. *Metropolitan Ry. Co.* (4); *Bank of New South Wales* v. *Owston* (5); *Lambert* v. *Great Eastern Ry. Co.* (6) *Goff* v. *Great Northern Ry. Co.* (7) shows that the onus of proof that the servant has authority to do the act is on the plaintiff.

As to the claim for slander, no action will lie without proof of special damage where, as in the present case, the offence charged in the slander is punishable by fine only. The words uttered by the porter did not suggest a second offence which is punishable by imprisonment. But even if they did, imprisonment is only an alternative punishment, and that is not sufficient to make the words actionable without special damage: *Michael* v. *Spiers & Pond* (8); *Hellwig* v. *Mitchell* (9); *Webb* v. *Beavan.* (10)

Neilson in reply. The porter had implied authority to arrest the plaintiff. Sect. 103 of the Railways Clauses Consolidation Act, 1845, imposes a penalty upon passengers travelling with intent to avoid payment of their proper fare, and s. 104 clothes the officials of the railway company with power to detain them. Those sections remained in force till they were partially repealed by the Statute Law Revision Act, 1892, and so far as repealed they were re-enacted and replaced by s. 5 of the Regulation of Railways Act, 1889. The Statute Law Revision Act, 1892, made no alteration in the law. The power to arrest for the offence charged by the porter therefore still exists.

As to the claim for damages for slander, the charge made by the porter must be assumed to have the most serious meaning it will bear, and it is capable of meaning that the plaintiff had committed the offence before. A sentence of imprisonment can be inflicted for a second conviction, and the slander is therefore actionable without proof of special damage. In *Michael* v. *Spiers & Pond* (8) and

(1) (1870) L. R. 5 C. P. 445.
(2) (1870) L. R. 6 Q. B. 65.
(3) (1872) L. R. 7 C. P. 415.
(4) (1872) L. R. 8 Q. B. 36.
(5) (1879) 4 App. Cas. 270.
(6) [1909] 2 K. B. 776.
(7) 3 E. & E. 672.
(8) 101 L. T. 352.
(9) [1910] 1 K. B. 609.
(10) (1883) 11 Q. B. D. 609.

Hellwig v. *Mitchell* (1) the offences charged were punishable by fine only. [*Knights* v. *London, Chatham, and Dover Ry. Co.* (2) was also referred to.]

ROWLATT J. I am of opinion that the objections which have been taken on behalf of the defendants are well founded. The plaintiff complains, first, of an illegal arrest (or assault, which for the purposes of this case is the same thing), and, secondly, of slander. The evidence which he has given so far as concerns the slander is that a servant of the defendants said, in the hearing of bystanders, "You have been travelling first class with a third-class ticket," and took him by the arm back to the collector at the barrier. The offence of travelling first class with a third-class ticket, if with intent to avoid payment of the fare, is punishable by fine only, although, as a means of exacting the fine, there can be imprisonment in default. It is settled by *Michael* v. *Spiers & Pond* (3) and *Hellwig* v. *Mitchell* (1) that to accuse by spoken words a person of having committed that class of offence is not actionable slander without special damage. But it is contended on behalf of the plaintiff that as the offence of travelling without paying the railway fare with intent to defraud is punishable by imprisonment without the option of a fine upon a second conviction, and as there is evidence that the porter charged his client with having travelled without paying his proper fare after having been convicted,—because the words "You have been travelling first class with a third-class ticket" ought to be taken to mean that the plaintiff had been travelling first class with a third-class ticket after having been convicted of that offence—the words are actionable without proof of special damage. I can only say that the words are not capable of bearing that meaning, and the question whether they do in fact bear that meaning could not be left to a jury. It is not a possible contention.

As to the claim for assault and false imprisonment, the porter technically arrested the plaintiff, but the fact that a person does a thing is not evidence that he has authority to do it. There is no evidence that the porter had any actual authority from the defendants to arrest the plaintiff or anybody else, but there is the question

(1) [1910] 1 K. B. 609. (2) (1893) 62 L. J. (Q.B.) 378.
(3) 101 L. T. 352.

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whether he had implied authority. To answer that question it is necessary to ascertain exactly what are the powers of the railway company itself, because the principle which is applicable is that they are not to be held to have impliedly given authority to their servants to do something which would be unlawful for them to do themselves. They might authorize their servants expressly, but it is for the plaintiff to prove that they have. The law does not imply against them that they have given authority to their servants to do things which they have no right to do themselves. What is the power of a railway company in the circumstances of the present case? By s. 103 of the Railways Clauses Consolidation Act, 1845, the offence was created of travelling without having previously paid the fare with intent to avoid payment; also the offence of wilfully refusing to quit the carriage on arrival at the point of destination. Travelling without having previously paid the fare includes not having paid the proper fare, and by s. 104 it was provided that any person discovered in or after committing or attempting to commit any of the offences mentioned in s. 103 might be arrested by any servant of the company. In 1889 a curious statutory situation was brought about by reason of the enactment of s. 5 of the Regulation of Railways Act, 1889. In my view that section replaces ss. 103 and 104 of the Railways Clauses Consolidation Act, 1845, so far as it covers the same ground. It is an extraordinary thing that s. 5 of the Act of 1889 should have been placed upon the Statute-book, and that it should not have been made clear by repeal or otherwise how ss. 103 and 104 of the Act of 1845 were to stand in future. But the Statute Law Revision Act, 1892,—a form of enactment which prima facie does not change substantive law—repealed all the earlier and, for the purpose of the plaintiff, the relevant part of s. 103 of the Railways Clauses Consolidation Act, 1845. It left the definite offence of not quitting a carriage still governed by s. 103, and left s. 104, which was still necessary to give powers of arrest applicable to that offence; but in my view, so far as the offence of not paying the fare is concerned, the code and the remedy for it contained in the Railways Clauses Consolidation Act, 1845, were abolished, and an entirely new code was provided by s. 5 of the Act of 1889, and under that code there is no power to arrest for travelling without having previously paid the fare with intent to avoid payment

thereof. The only power of arrest is to arrest a person for not having produced his ticket and refusing on request by an authority to give his name and address. It is for that, and that alone, that the companies are empowered to arrest passengers. It follows, according to the principle laid down in *Poulton* v. *London and South Western Ry. Co.* (1), that the defendants only impliedly give authority to their servants to arrest passengers for not giving their name and address on the request of an officer or servant of the railway company after not producing a railway ticket nor paying their fare. That means that the defendants must be taken to have impliedly authorized their servants to arrest passengers upon an allegation by the servant that the passenger has refused to give his name and address upon request. It does not mean that the railway company only impliedly give their servants authority to arrest passengers when the allegation of the servant is true, so that the railway company would not be responsible if the arrest was not justified; but it means that the railway company only give the servant authority to act for them in determining whether a passenger shall be arrested, and to arrest him when the accusation against him is such as gives power to the railway company themselves to arrest. The evidence in the present case negatives the suggestion that the company had any power to arrest the plaintiff for the offence with which the porter charged him. The porter emerged from the crowd and proceeded to arrest him for an irrelevant cause. He simply came forward and seized him by the arm for travelling in a class superior to that for which he had a ticket. He might as well have purported, so far as any legal justification goes, to arrest him for travelling without a hat, or for any other trivial cause. He had no authority to do that on behalf of the railway company. The railway company did not put him there to decide whether or not the plaintiff had travelled or whether there was a case against him for travelling without a proper ticket and to arrest him for that reason. They might have put him there to decide whether a man had failed to give his name and address, but that was not the point raised by the porter. The porter arrested the plaintiff for a cause that was wholly outside any implied authority he could possibly have. On those grounds it seems to me that the point taken upon behalf of the defendants is

(1) L. R. 2 Q. B. 534.

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one to which there is no answer, and that the action fails and must be dismissed with costs.

Judgment for defendants.

Solicitors for plaintiff: *Bartlett & Gluckstein.*
Solicitor for defendants: *L. B. Page.*

NOTE.—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 103: "If any person travel or attempt to travel in any carriage of the company, or of any other company or party using the railway, without having previously paid his fare, and with intent to avoid payment thereof, or if any person, having paid his fare for a certain distance, knowingly and wilfully proceed in any such carriage beyond such distance, without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof, or if any person knowingly and wilfully refuse or neglect, on arriving at the point to which he has paid his fare, to quit such carriage, every such person shall for every such offence forfeit to the company a sum not exceeding forty shillings."

Sect. 104: "If any person be discovered, either in or after committing or attempting to commit any such offence as in the preceding enactment mentioned, all officers and servants and other persons on behalf of the company, or such other company or party as aforesaid, and all constables, gaolers, and peace officers, may lawfully apprehend and detain such person until he can conveniently be taken before some justice, or until he be otherwise discharged by due course of law."

Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57), s. 5, sub-s. 1: "Every passenger by a railway shall, on request by an officer or servant of a railway company, either produce, and if so requested deliver up, a ticket showing that his fare is paid, or pay his fare from the place whence he started, or give the officer or servant his name and address; and in case of default shall be liable on summary conviction to a fine not exceeding forty shillings."

Sub-s. 2: "If a passenger having failed either to produce, or if requested to deliver up, a ticket showing that his fare is paid, or to pay his fare, refuses, on request by an officer or servant of a railway company, to give his name and address, any officer of the company or any constable may detain him until he can be conveniently brought before some justice or otherwise discharged by due course of law."

Sub-s. 3: "If any person—

"(*a*) Travels or attempts to travel on a railway without having previously paid his fare, and with intent to avoid payment thereof;

. . . . . .

he shall be liable on summary conviction to a fine not exceeding forty shillings, or, in the case of a second or subsequent offence, either to a

fine not exceeding twenty pounds, or in the discretion of the Court to imprisonment for a term not exceeding one month."

By the schedule to the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), s. 103 of the Railways Clauses Consolidation Act, 1845, is repealed to " thereof or " where those words last occur.

J. E. A.

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Jan. 31; *Feb.* 1, 2.

Landlord and Tenant—Lease—Covenant by Lessee to repair—Lessee " being allowed all necessary materials " for Repair—Construction—Qualification of Lessee's Covenant, not Covenant by Lessor—Custom—Inconsistency with Lease.

In the lease of a farm for twenty-one years the lessee covenanted with the lessor that he would " from time to time during the said term at his own cost (being allowed all necessary materials for this purpose (to be previously approved in writing by the lessor) and carting such materials free of cost a distance not exceeding five miles from the farm) when and so often as need shall require well and substantially repair and maintain the farm house &c. to the said premises belonging " :—

Held by Viscount Reading C.J. and Ridley J., Lord Coleridge J. dissenting, that there was no covenant by the lessor to supply materials necessary for the proper repair and maintenance of the demised premises, but only a qualification of or condition precedent to the lessee's liability to repair.

Held, further, that evidence of a custom that " the landlord provides the tenant with materials necessary for the proper repair and maintenance of the demised premises and the tenant repairs and maintains the same with such materials and provides the necessary cartage " was inadmissible inasmuch as it would be inconsistent with the terms of the lease which dealt with this subject in a particular manner.

CASE stated by an arbitrator under s. 19 of the Arbitration Act, 1889.

By a lease by deed made in 1905 a farm and premises were demised by the predecessors of the defendant to the plaintiff for the term of twenty-one years (determinable as therein appeared) at the yearly rent of 272*l*. The lease contains (among the covenants by the lessee) a covenant to the following effect : " And also from time to time during the said term at his own cost (being allowed all necessary

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materials for this purpose (to be previously approved in writing by the lessor) and carting such materials free of cost a distance not exceeding five miles from the farm) when and so often as need shall require well and substantially repair and maintain . . . . amend and keep the farm house stable land and premises . . . . and all the gates posts . . . . to the said premises belonging or appertaining in by and with all manner of needful and necessary reparations . . . . and amending whatsoever (damage by accidental fire excepted)."

The lessor has not called upon or required the lessee to repair the demised premises in accordance with the above covenant, but it is to be taken for the purpose of this case that the premises are not in the state of repair required by that covenant. In this arbitration the lessee claims against the lessor damages in respect of the non-compliance by the lessor with the applications by the lessee to him to supply materials necessary for the repair of the premises; and it is to be assumed that all necessary applications have been made by the lessee to the lessor and have not been complied with.

It was contended before the arbitrator on behalf of the lessee: (1.) That upon the true construction of the above covenant the lessor was under covenant and bound to allow, supply, or pay the cost of, at a distance not exceeding five miles from the said farm, all materials necessary for the purpose of enabling the lessee to carry out the obligation to repair imposed upon him by the said covenant. (2.) Alternatively, that if the lessor was not so bound the lessee was entitled to give evidence of a custom of the country whereby the lessor would be bound to allow materials necessary for the repair of the said premises. For the purposes of this case it is to be assumed that the custom alleged by the lessee is as follows:—The landlord provides the tenant with materials necessary for the proper repair and maintenance of the demised premises, lands, and hereditaments, and the tenant repairs and maintains the same with such materials and provides the necessary cartage. On behalf of the lessor it was contended: (1.) That upon the true construction of the lease the covenant referred to was a covenant by the lessee only and not by the lessor; that the lessor was not under any obligation to allow, supply, or pay the cost of such materials unless he had first called upon or required the lessee to

repair the demised premises in accordance with the covenant; and that the allowance of materials was a mere qualification of the lessee's liability thereunder to repair. (2.) That, assuming any such custom to exist, the same was excluded and its operation prevented by the contract between the parties contained in the lease.

The questions for the Court are: (1.) Whether upon the true construction of the lease, and assuming all necessary applications to have been made to him, the lessor is under covenant to allow, supply, or pay the cost to the lessee of all necessary materials for the purpose of enabling the lessee to carry out the obligation to repair imposed upon him by the covenant referred to although the lessor has not called upon or required the lessee to carry out such obligation; and (2.) if the lessor is not so bound, whether by the contract between the parties contained in the lease the alleged custom is excluded and its operation prevented.

J. B. Matthews, K.C., and *Vernon*, for the defendant. The provision inserted in the lessee's covenant to repair with reference to the supply of materials for repair by the lessor is merely a qualification of the obligation imposed on the lessee or a condition precedent to his liability to perform that obligation. In farming leases such a provision has been usual for a very long time, and the question arose long ago whether it amounted to a covenant or agreement by the lessor or only to a qualification of the lessee's covenant. In Rolle's Abridgment, vol. 1, p. 518, it is stated: "If the lessee for years covenants to repair &c., Provided always and it is agreed that the lessor shall find great timber &c., that will constitute a covenant on the part of the lessor to find great timber because of the word 'agreed,' and will not be a qualification of the covenant of the lessee. But if the lessee covenants to repair (Provided always that the lessor shall find great timber, without the word 'agreed') that proviso will not constitute any covenant on the part of the lessor but solely a qualification of the covenant of the lessee"; and *Holder* v. *Tayloe* (1) is cited as the authority for that statement. In *Treloar* v. *Bigge* (2), where there was a covenant by the lessee not to assign without consent of the lessor, "such consent not

(1) Tr. 12 Ja. B. (2) (1874) L. R. 9 Ex. 151, 156.

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being arbitrarily withheld," the lessee sued the lessor for damages for breach of covenant to consent, and it was held that there was no covenant by the lessor, but only a qualification of the covenant of the lessee; and Amphlett B. said: "If that be so they cannot be construed as creating a cross liability. They either qualify the tenant's covenant, or they create a covenant on the landlord's part. They cannot do both." That decision is precisely in point here, and it was followed by Hall V.-C. in *Sear* v. *House Property and Investment Society*. (1) In *Thomas* v. *Cadwallader* (2) the words "lessor finding, allowing and assigning timber sufficient for such reparations" in a covenant by the lessee to repair were held plainly to constitute only a condition precedent to or qualification on the lessee's covenant. The decision in *Martyn* v. *Clue* (3) shows that such words as these amount only to a condition precedent or qualification. To the same effect as the passage in Rolle are the statements in 2 D'Anvers, p. 229, Viner's Abridgment, tit. Covenant, C. 3, and Comyns's Digest, tit. Covenant, A. 3. The question is really one of construction of the particular document in each case, and the rule is well established that to constitute a covenant there must be some words of agreement or covenant and not merely of qualification or condition. The rule is well stated by Lord Denman C.J. in *Wolveridge* v. *Steward* (4) as follows: "It is fully established that no precise form of words is necessary to constitute a covenant. 'Any words in a deed which show an agreement to do a thing make a covenant'; but it must be clear that they are meant to operate as an agreement, and not merely as words of condition or qualification." In the present case the plain, natural, and grammatical meaning of the words, occurring, as they do, in the lessee's covenant, is that they constitute only a qualification of the lessee's covenant and not an independent covenant by the lessor. That construction is in accordance with principle and the authorities.

A. Powell, K.C., and *Stuart Bevan*, for the plaintiff. It is agreed that no express words of covenant or agreement are necessary to constitute a covenant. Any words of agreement or obligation are sufficient in a deed to make a covenant. The question is one of construction, whether the intention of the parties is that there

(1) (1880) 16 Ch. D. 387.
(2) (1744) Willes, 496.
(3) (1852) 18 Q. B. 661.
(4) (1833) 1 Cr. & M. 644, 657.

shall be an independent obligation and not merely a qualification or condition precedent. In this lease two obligations are being considered, that of the lessee to repair and that of the lessor to provide materials, and the apparent intention of the parties is that each shall be bound by an obligation, and the proper construction is that there is a covenant by the lessor. The statement in Rolle's Abridgment, vol. 1, p. 518, which has been cited is really of no authority: the case of *Holder* v. *Tayloe* which is there given as the authority is reported (1), but in no way bears out that statement; and it is now clear law that the mere presence or absence of the word "agreed" does not determine the question whether there is a covenant or not. In Sheppard's Touchstone, p. 162, it is thus stated: "And there needs not in this case formal and orderly words, as covenant, promise and the like, to make a covenant on which to ground an action of covenant, for a covenant may be had by any other words . . . . And therefore if these words be inserted in a deed amongst other covenants 'that the lessee shall repair, provided always that the lessor shall allow timber'; or that 'the lessee shall scour ditches, provided always that the lessor do carry away the earth,' these are good covenants on both sides." That is a book of the very highest authority, and has for very long been relied on by conveyancers. The above passage is a direct authority in the present case, the words being practically the same. In *Glazebrook* v. *Woodrow* (2) Lord Kenyon C.J. seems to have disapproved of *Thomas* v. *Cadwallader*. (3) The same words may amount both to a condition and to a covenant: Platt on Covenants, p. 72. In *Treloar* v. *Bigge* (4) the decision was merely that the lessee was released from his covenant: see *Bates* v. *Donaldson*. (5) *Cannock* v. *Jones* (6) and *Brookes* v. *Drysdale* (7) are also authorities for construing this provision as a covenant by the lessor. "Where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the

(1) (1613) Hob. 12; 1 Brownl. 23.
(2) (1799) 8 T. R. 366.
(3) Willes, 496.
(4) L. R. 9 Ex. 151.
(5) [1896] 2 Q. B. 241, 247.
(6) (1849) 3 Ex. 233.
(7) (1877) 3 C. P. D. 52.

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carrying out of that thing, though there may be no express words to that effect" : *Mackay* v. *Dick.* (1) That passage exactly applies to the present case. The passages from Viner, Comyns, and D'Anvers which have been cited are mere repetitions of the statement in Rolle. *Warren* v. *Asters* (2) and *Mucklestone* v. *Thomas* (3) are also authorities that this provision ought to be construed as an independent covenant.

Upon the second point, assuming that there is no covenant by the lessor, evidence of the alleged custom is admissible to prove an obligation on the part of the lessor because it would not contradict or be inconsistent with the terms of the lease ; it would be supplementary and not contradictory to the terms of the lease. Unless a custom is excluded by the express terms of a contract, or owing to the express terms of the contract it is impossible to import it into the contract, it can always be proved and made part of the contract : *Tucker* v. *Linger.* (4)

Vernon in reply. In *Dean, &c., of Bristol* v. *Jones* (5) the case of *Thomas* v. *Cadwallader* (6) was treated as being a good authority. In *Warren* v. *Asters* (2) it was impossible to say that the words used were only a qualification or a condition precedent.

Upon the other point, evidence of the alleged custom is not admissible because it would be inconsistent with the terms of the lease. The matter of the supply of materials for repair by the lessor is dealt with by the lease in a particular way, and, that being so, a custom cannot be imported into the lease to deal with that matter in any different way or to supplement the express provision of the lease : *Webb* v. *Plummer* (7) ; *Roberts* v. *Barker* (8) ; *Hutton* v. *Warren.* (9)

Powell, K.C., in reply on the second point. A custom is not excluded merely because the lease deals in some way with the particular subject ; the provision in the lease must be so inconsistent with the custom as to be equivalent to saying that the custom must be excluded.

(1) (1881) 6 App. Cas. 251, 263.
(2) (1681) T. Jo. 205.
(3) (1739) Willes, 146.
(4) (1883) 8 App. Cas. 508.
(5) (1859) 1 E. & E. 484.
(6) Willes, 496.
(7) (1819) 2 B. & Al. 746.
(8) (1833) 1 Cr. & M. 808.
(9) (1836) 1 M. & W. 466.

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VISCOUNT READING C.J. The first question in this case is whether certain words in an indenture of lease of a farmhouse, stables, buildings, lands, and other premises constitute a covenant by the lessor, or are only a qualification of a covenant by the lessee. The words contained in the covenant by the lessee which have been the subject of so much discussion are: [His Lordship read the covenant.] The landlord has not called upon, and does not require, the tenant to repair; and we are to assume, for the purpose of this case, that the premises are not in the state of repair required by the covenant, and that, if the lessor is under the obligation of a covenant, as claimed by the lessee, all necessary applications have been made by the lessee to the lessor to supply the materials for the repairs. There is an arbitration proceeding between the lessor and the lessee arising out of the terms of this lease and the events that have happened thereunder, and the lessee claims damages against the lessor for not allowing the necessary materials for repair.

The lessor contends that he is under no obligation to supply the materials unless and until he has required the lessee to repair, and that if he does not require the lessee to repair, then he is not bound in any way to supply the materials. The lessee contends that the lessor is under an obligation to supply the materials in order to enable him, the lessee, to carry out the obligation to repair imposed upon him by the lease. The problem is to discover the intention of the parties from the language used in the indenture. The words under consideration, with the language of the whole indenture, are the sole evidence of their intention. It is difficult to formulate a precise rule to be applied in determining whether the language used amounts to an independent covenant, or only to a condition precedent to the obligation of the other party. There is no doubt that no particular words are required to constitute a covenant; neither are particular words required to constitute a condition. As was said by Lord Denman C.J. in *Wolveridge* v. *Steward* (1), "It is fully established that no precise form of words is necessary to constitute a covenant. 'Any words in a deed which show an agreement to do a thing make a covenant'; but it must be clear that they are meant to operate as an agreement, and not merely as words of condition or qualification." That is a quotation in

(1) 1 Cr. & M. 644, 657.

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Lord Denman's judgment taken from Comyns's Digest, tit. Covenant, A. 2. Then Lord Denman proceeds: "Are then the words in question meant to be used as words of agreement between the assignor and assignee, or words of qualification to modify and restrain the generality of the words which precede, and to express clearly the intention of the assignor," and so forth; and he says to determine this we must look at the indenture. I think that states the principle upon which we must decide this case.

I think for myself that this is a difficult case and a very finely balanced proposition whichever view may be adopted, and I admit that my mind has fluctuated during the argument; and, let me observe, during an argument of great ability on both sides, from which the Court has derived great assistance. Now one has to come to a conclusion as to the meaning of these words. From the best consideration I have been able to give to them, and basing myself also upon well-known decisions, authorities, and text-books, I have come to the conclusion that it is not intended by this lease to create a covenant by the lessor, but that it is intended to impose the performance of a condition upon the lessor with respect to the covenant by the lessee to repair. I am compelled to this conclusion by the authorities, notwithstanding the passage in Sheppard's Touchstone upon which so much reliance was placed, and naturally placed, for the lessee. To my mind the passage in Rolle's Abridgment, vol. 1, p. 518, stands as the law. It is to the effect that if the lessee covenants to repair, "provided always that the lessor shall find great timber, without the word 'agreed,'" this proviso shall not be a covenant on the part of the lessor, but shall only be a qualification of the covenant of the lessee, and the authority for that is given as *Holder* v. *Tayloe*, per curiam, in Tr. 12 James I. It is right to say that, so far as can now be ascertained, there is no record of the decision to this effect in *Holder* v. *Tayloe*, although the industry of counsel has supplied us with another reference to this case. But there it stands. The law is so stated in D'Anvers's Abridgment and in Viner's Abridgment. It is so again stated, and words to the same effect are used, in Comyns's Digest, tit. Covenant, A. 3. Similar language is used in Bacon's Abridgment, tit. Covenant, A. In Platt on Covenants, p. 75, it is cited, I will not say as embodying what the author thought

should be the law, but as stating what at any rate was the law.

That is a strong current of old and highly respected authority. I agree that, if we find a decision of the Courts which shows that those authorities are wrong, we should be bound to give effect to it; but when we find a strong current of authority, even though we cannot find a decision, it must have very great weight with this Court. The matter does not rest there, because there is a decision, to which I attribute a high importance in this case, of Willes C.J. in *Thomas* v. *Cadwallader*. (1) The marginal note to the report is: "In an action on a covenant against a lessee for not repairing (the covenant adding 'the lessor allowing and assigning timber for the repairs') it is necessary to aver that the lessor did allow and assign timber, &c." Now the language of that clause is for all practical purposes the same as this; and I look, therefore, to that case to see what the Courts thought in the year 1744 was the meaning of such language. Willes C.J. in two passages in his judgment made it quite clear that this was not a covenant by the lessor, but a qualification of the covenant by the lessee, for he said that this finding of the timber was a thing in its nature necessary to be done first, and therefore must be considered as a qualification of the lessee's covenant. I understand that to mean that where we find that the thing to be done is to precede the performance of the obligation on the part of the covenantor, the tendency of the Courts is to construe it as a condition precedent, provided that there is nothing in the language used which will make it inconsistent so to construe it. Where, on the other hand, we find that the thing to be done is to succeed the performance of the obligation by the party covenanting, the tendency of the Courts has been to construe that as a covenant, unless the language is inconsistent with that view. That seems to me to be based on sound sense, as one would expect from the opinions of the learned judges which have been cited in this case. In *Thomas* v. *Cadwallader* (1) Willes C.J. discussed, as Mr. Powell rightly pointed out to us, a number of cases, or made observations referring to cases which had been cited, which show that he was dealing also with mutual covenants, and the necessity for the averment in a declaration of the performance

(1) Willes, 496, 500.

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of one covenant before proceedings could be properly launched and concluded against the covenantor; but, notwithstanding that he does that and expresses doubt as to some of the decisions, he winds up with this, which I cannot but think is conclusive of the present case: "Where words make a condition precedent or a qualification of a covenant, as the present case plainly is, all the cases agree that the plaintiff in his declaration must aver the performance of such condition or qualification." I cannot see my way out of those words. I cannot find anything in any decision, or in any book, which qualifies that language; and I think it is essential to bear in mind also that leases have been drawn for a very long time with these cases standing in the books and deciding the meaning of those words. I therefore think the Court ought not lightly to put its own construction on that language when it has this authority, and when one must assume that lawyers who have drawn leases ever since that time have had the idea that it shall be a qualification of the covenant of the lessee and not a covenant on the part of the lessor. When Willes C.J. says "as the case plainly is," that is, a condition precedent or a qualification, he is for all practical purposes dealing with the exact language with which we are dealing in this case, that is, "the lessor allowing and assigning timber for the repairs."

I will now refer shortly to two other cases which have been much relied upon for the lessor, *Treloar* v. *Bigge* (1) and *Sear* v. *House Property and Investment Society*. (2) In both those cases the Court was determining the meaning to be attributed to the language of a well-known clause in a lease, as to the lessee's right to assign or sub-let. I will not refer to those decisions at length; they are very well known. The substance of the decisions is that where the lessee has covenanted not to assign or sub-let without the consent in writing of the lessor, such consent not to be arbitrarily withheld, that is not a covenant by the lessor, but a condition or qualification of the covenant by the lessee, and that no action for damages will lie against the lessor; but that if the lessor improperly withholds his consent, then the lessee is entitled to act without the consent, without incurring any forfeiture or running any risk if he shows that the consent ought to have been given. The reasoning of those

(1) L. R. 9 Ex. 151. (2) 16 Ch. D. 387.

cases tends to the same conclusion as that which I have adopted based on the other authorities to which I have referred. In *Sear* v. *House Property and Investment Society* (1) occurs the only passage to which attention has been directed which is said to shake the value, by judicial authority, of the statement in Rolle's Abridgment. In that case Hall V.-C. was dealing with the same covenant as in *Treloar* v. *Bigge* (2), and he referred to Sheppard's Touchstone where the passage occurs which is so much relied upon for the lessee, and said: "One example mentioned was that 'the lessee shall repair provided that the lessor shall allow timber.' That is an affirmative covenant. . . . . The next example was 'that the lessee shall scour ditches; provided always that the lessor do carry away the earth.'" That passage, taken by itself, would carry the argument on behalf of the lessee. I cannot myself understand why it is so stated, or what foundation there is for the statement. It seems to me to be in direct conflict with the law in *Thomas* v. *Cadwallader*. (3) It probably was meant by the learned author as an instance of a covenant, which must be regarded with the context of the lease. But it is said that Hall V.-C. affirmed Sheppard's Touchstone and disapproved of Rolle. I cannot see that. It had nothing to do with the point Hall V.-C. had to decide, and was only introduced as an example of qualifications of covenants; and that is made clear at the end of the argument. Hall V.-C. said that he came to the conclusion that "the examples which have been cited from Sheppard's Touchstone are quite consistent with the view I have adopted." Then he goes on to say, after reading the first example, "that is an affirmative covenant; it is manifest that the lessee could not repair without timber, and it is natural that there should be a contract or arrangement to repair,—that the one would find the timber and the other make the repairs." There he is only dealing with the instances which have been cited to him, and it appears to me quite clear he never intended to say that was good law, and still less would have so intended if all the authorities had been cited to him.

Therefore I have arrived at the conclusion I have stated, and

(1) 16 Ch. D. 387, 391. (2) L. R. 9 Ex. 151.
(3) Willes, 496.

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will only add that I see nothing unreasonable in the view for which the lessor contends; neither do I see anything unreasonable in the contention of the lessee; but it is not the function of this Court to decide whether or not it is reasonable. We have to find the intention of the parties from the language used in the document. If we find that one construction is wholly unreasonable, it would be an inducement to come to the conclusion that the other is right, if it is a possible construction; where both are reasonable, we must deal only with the language, subject to the authorities. It seems to me that it was intended here to create an obligation upon the lessee in favour of the lessor. The lessor's premises are to be kept in repair by the lessee; but the lessee stipulates that if he has to do that the lessor should, before he can call upon the lessee to perform his obligation, that is by action or any proceeding, have supplied the material within the limits laid down in the lease. I therefore decide in favour of the lessor that there is no covenant by him.

The second question is whether the lessee can give evidence of a custom that the lessor should provide the lessee with materials necessary for proper repair; and upon that I come to the conclusion that it is not open to the lessee to give this evidence, because if it is admitted and established as a fact it would be inconsistent with the terms of the lease. In this connection it is necessary to say that the law is now clear in principle; the custom is binding if not inconsistent with the terms of the written contract, with certain other qualifications with which I need not deal in this case. Here the whole question is whether it is inconsistent with the written contract. I feel much pressed by the language used in *Hutton* v. *Warren* (1) by Parke B. when he is dealing with the case of *Webb* v. *Plummer* (2), and it seems to me that the conclusion arrived at in the last named case precludes the contention of the lessee in the present case. It was there held that the language of the lease was equivalent to a stipulation that the lessor should pay for the things maintained and no more. The words "and no more" were of course not in the lease; but the substance of the decision is that where the subject-matter is dealt with in the lease, and there is a provision in the lease that certain things shall be paid for, it must

(1) 1 M. & W. 466, 477. (2) 2 B. & Al. 746.

be read as if it said that those things should be paid for and no more. In the same way I read the case of *Roberts* v. *Barker*. (1) Applying the principle of *Hutton* v. *Warren* (2) and the other decisions to this case I think that if evidence were admitted to show there was a custom that the lessor must provide all the materials for repair, it would be inconsistent with the terms of the lease which provide that the landlord shall supply the materials as a condition precedent to calling upon the tenant to perform the obligation to repair. I read the words of Parke B. in *Hutton* v. *Warren* (2) as meaning that that is the extent of the obligation of the landlord to supply materials. That is the condition, and there is no other. For that reason I come to the conclusion that the second question must be answered in the negative, that is, that the evidence is excluded, and consequently that the lessee cannot give the evidence which is desired.

RIDLEY J. I am of the same opinion. I agree that this is a difficult case which requires a very careful examination of the authorities, and I wish to express my obligation to counsel for the arguments that have been addressed to us.

I will begin by examining the document itself, and I certainly come to the conclusion, after considering it to the best of my ability, that, according to the natural meaning of the words and the position in which they occur in the instrument, these words " being allowed all necessary materials for this purpose " ought to be taken as a qualification of the covenant, and not as a covenant on the part of the lessor. The sentence occurs in the middle of that portion of the instrument which contains the covenants by the lessee with the lessor, and it is under the heading " And the lessee hereby covenants with the lessors in manner following that is to say " ; and there are no words of obligation on the part of the lessor in that part of the document at all, but not until several pages later, where his obligations by way of covenant with the lessee are set out. The words themselves do not appear to me, unless I am forced to give them such a construction by authority, to bear the implication that there is any obligation on the part of the lessor to find the materials except when he has required the lessee to repair.

(1) 1 Cr. & M. 808. (2) 1 M. & W. 466.

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In other words, the deed seems to say that if the lessor requires the lessee to put the premises into repair he shall and must allow him all necessary materials; on the other hand, the contention of the lessee amounts to this, that the lessee may say that he wants to put the premises in repair and therefore requires the lessor to supply the materials. I think that is a very different meaning, and I should not be willing to come to the conclusion that that was the meaning of this deed unless I were compelled to do so by a distinct authority. Now I do not find any authority which goes to anything like that extent; and I think that, although the authorities are somewhat inconsistent with each other, it will be found they are almost conclusive on the other side of the question. I am not, however, prepared to accept entirely the authority in Rolle's Abridgment, which was the chief foundation of the argument for the lessor. I think the case has been lost to which the Abridgment refers; and in the circumstances it is not easy to attach much authority to the passage itself. If it were really a case decided in Trinity Term, 12 James I., it would have the high authority of Lord Coke, who was then Chief Justice of this Court; but it is not to be found in that Term, either in Cro. Jac., Bulstrode, or Rolle; and, as far as I know, there is no reported case which supports the passage in Rolle's Abridgment. The report in Hobart, 12, is upon a different point, and it is also (according to the marginal note) not of 12 Jac. 1, but of 11 Jac. 1, which time Lord Coke was not Chief Justice of the Court, so it would have a very different significance. Further, it seems to me the two paragraphs in Rolle are not correct according to the subsequent authorities. They state that if the lessee for years covenants to repair, provided and it is agreed that the lessor shall find great timber, that will make a covenant and not a qualification upon the covenant; that it would make an express covenant on the part of the lessor to find the timber. If, on the other hand, the lessee covenants to repair, provided always that the lessor shall find great timber, leaving out the word "agreed," then there will be only a qualification, and not a covenant. I do not think that we should accept that as being now a sufficient distinction. It seems to me to be clear from the authorities that provided there be words which amount to an agreement, and if the collocation of the words admits

of the implication, the precise word "covenant" is certainly not required, nor any particular word, provided only that from the passage in the deed, the construction of which is before the Court, it seems to follow there is an agreement on the part of the lessor. Therefore the passage in Rolle is not satisfactory because it says apparently that a particular word is required when the subsequent authorities show that it would not be so.

Sheppard's Touchstone, p. 162, was the sheet-anchor of the lessee; at least, although other authorities were cited to support his position, that was his best one. Now Sheppard's Touchstone seems to me, if it is taken to mean absolutely what it says, to be erroneous. It is stated that this book was written by Doddridge J. If so, it is curious that that learned judge was a member of the Court in 12 James I. when the very decision cited in Rolle was arrived at. Let us see what Sheppard's Touchstone says: "And therefore if these words be inserted in a deed amongst other covenants 'that the lessee shall repair, provided always that the lessor shall allow timber'; or 'that the lessor shall scour ditches, provided always that the lessor do carry away the earth'; these are good covenants on both sides." That is most distinctly wrong according to the case of *Thomas* v. *Cadwallader* (1), and does not follow any decision which we can find, which makes one suspect those were not the words of Doddridge J., but of Sheppard, the first editor, a person, indeed, of great authority. In 1744 it was distinctly decided by the Court of Common Pleas in *Thomas* v. *Cadwallader* (1) that in the two instances put the Court would arrive at different results, whereas Sheppard gives them both the same result. I think that Willes C.J. attached great importance to this point, that in one case the materials had to be provided before the repairs had to be undertaken, and in the other case the earth had to be carried away after the ditches had been scoured, whereas the passage in Sheppard's Touchstone, if it is to be taken as it stands, says at once, without referring to the distinction or the possibility of argument, "these are good covenants on both sides." I think, therefore, that passage fails to carry weight as against the decision in *Thomas* v. *Cadwallader*. (1)

I will say a word or two about *Cannock* v. *Jones* (2), which was

(1) Willes, 496. (2) 3 Ex. 233.

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rather pressed upon us by Mr. Powell. That was a case in which the lessee covenanted with the lessor that he would during the continuance of the term keep the premises in repair when and as often as occasion shall require, " the said farmhouse and buildings "—that is a portion of the premises—" being previously put in repair and kept in repair by the said " landlord. It was held that these words amounted to a covenant. That is an example of that being done where neither the express word " covenant " nor any word of agreement was found in the document itself, and it is certainly the strongest case, I think, speaking personally, that can be found or has been quoted for holding in similar circumstances to these that the lessor has entered into a covenant. But Parke B. (1) in giving judgment in that case said, " perhaps, if the words ' kept in repair ' were omitted, this might amount to a condition precedent," which seems to destroy to a great extent the value of the case when we have to compare it with the instance now before us where the obligation on the part of the lessor is to provide the materials, and there is no lasting or continuous obligation analogous to keeping in repair. I will refer shortly to *Treloar* v. *Bigge* (2) in consequence of the argument that these words may have two meanings and may amount not only to a qualification of the lessee's covenant, but also to a covenant by the lessor. It seems to me that when there is but one sentence such as this we cannot give it two separate independent meanings at the same time. On that point the judgment of Amphlett B. in *Treloar* v. *Bigge* (2) is of importance. In dealing with this point he said that the words in that case " either qualify the tenant's covenant or they create a covenant on the landlord's part. They cannot do both." I think that is right. Therefore, though I also have hesitated, I think in this case the lessor is entitled to succeed.

With regard to the custom, I have nothing to add to what my Lord has said.

LORD COLERIDGE J. With regard to the construction of this clause of the lease, I feel myself constrained to differ from the majority of the Court.

In this case we have to determine what is the true meaning of

(1) 3 Ex. 238. (2) L. R. 9 Ex. 151.

this clause; are the words "being allowed all necessary materials for this purpose (to be previously approved in writing by the lessor)" merely a condition precedent to the lessor's right to demand execution of the repairs by the tenant, or do they imply a covenant to allow the said materials when, the premises being out of repair, the lessee desires to do the repairs? On the first construction, the lessee fails; on the second, he is entitled to damages for non-fulfilment. The earliest authorities on the construction of words of similar import are, it is admitted, conflicting. Rolle's Abridgment states that where the words are that the lessee should repair, provided the lessor found him great timber for it, that would not be a covenant, but a qualification of the covenant of the lessee—not a covenant on the part of the landlord, but a qualification of the covenant of the lessee. He quotes a case of *Holder* v. *Tayloe* in support, but no case of that name deciding such a point can be found in the books; and it is the principle underlying the statement in Rolle's Abridgment that the word "agreed" is omitted, and that makes the whole difference as to the import of the clause. Then that view is certainly upheld in the case of *Thomas* v. *Cadwallader* (1), where, on the construction of the words "finding and allowing and assigning timber," on a strictly pleading point,—whether the lessor ought to have pleaded in the declaration claiming damages for breach of repair, the averment being "always ready and willing to find and allow," or whether the defendant must have recourse to a separate action on the covenant—the Court held the declaration to be bad, expressing the view that to hold the words to be a covenant would lead to multiplicity of actions. On the other hand, in Sheppard's Touchstone, p. 162, it is laid down: "And there needs not, in this case, formal and orderly words, as covenant, promise, and the like, to make a covenant on which to ground an action of covenant; for a covenant may be had by any other words"; and the following instance is given: "If these words be inserted in a deed amongst other covenants 'that the lessee shall repair, provided that the lessor shall allow timber'; or 'that the lessee shall scour ditches, provided always that the lessor do carry away the earth,' these are good covenants on both sides." If that is still sound law, I

(1) Willes, 496.

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think it applies to this case, because I can see no substantial difference in the language in Sheppard's Touchstone from the language of the indenture in question to make it inapplicable in this case.

There being this conflict of authority, I find that in the year 1877, in a case of *Brookes* v. *Drysdale* (1), Grove J. said that the question was "whether the word 'covenant' in the contract of sale in this case is to be tied down strictly to what was a covenant by the old law, or whether it was not intended by the parties to mean and include any stipulation or condition which might affect the lessee, of a nature and character which is other than is common and usual in public-house leases." Then he quotes Comyns's Digest and other ancient authorities, and concludes by quoting the words I have read in Sheppard's Touchstone as being the authority which is to guide the Court in the particular case. His judgment was supported by the judgment of Lindley J., as he was then.

Later than that, in the year 1880, in the case of *Sear* v. *House Property and Investment Society* (2), Hall V.-C. says this: "The examples which have been cited from Sheppard's Touchstone are quite consistent with the view I have adopted. One example mentioned was that 'the lessee shall repair, provided that the lessor shall allow timber.' That is an affirmative covenant: it is manifest that the lessee could not repair without timber,"—that cannot mean that there is no timber in the United Kingdom—"and it is natural that there should be a contract or arrangement to repair,—that the one would find the timber and the other make the repairs." He quotes, therefore, with approval the doctrine as embodied in the quotation from Sheppard's Touchstone. In the year 1849, in the case of *Cannock* v. *Jones* (3), where the clause was "the said farmhouse and buildings being previously put in repair and kept in repair by the said E. J.," Parke B. held that that was a covenant; and although he makes use of this phrase, "perhaps, if the words 'kept in repair' were omitted, this might amount to a condition precedent," I myself, giving the best attention I can to the case, cannot see really that that made any difference. If it did, there are words in this indenture about keeping in repair as well as putting into repair.

(1) 3 C. P. D. 52, 57. (2) 16 Ch. D. 387, 391.
(3) 3 Ex. 233, 238.

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There have been several cases decided that show that where a lease contains a prohibition for the tenant to sub-let or assign without the consent of the landlord, such consent not to be unreasonably withheld, or words to that effect, such words are conditional only on the right to sue for breach of the prohibition, and are not an independent covenant upon which the tenant can sue. That was the decision in the case of *Treloar* v. *Bigge* (1), which was decided in the year 1874. That is only a specimen of other cases of similar import. In my opinion there is a distinction between that class of cases and the present. Where a stipulation prevents the doing by one party unless something is done by the other party, the one party has his remedy. He may ignore the stipulation; the other party cannot sue him with success for breach of the stipulation because he is in fault. This class of cases perhaps might apply, I think, where the tenant let the premises fall into disrepair and was called upon by the landlord to perform his covenant, the landlord not having allowed all necessary material for repair.

It has been held, and is now the law, that it does not need any special language to create a covenant. If the words are capable of being construed as a covenant, they may be so construed; and, again, we may regard the intention of the parties in construing the document, as gathered from the document. This leads me to examine the document itself. The document itself, in my opinion, shows that it was in contemplation that the premises should be kept in repair during the tenancy. There is a provision first of all, which is now in question, which is a condition or covenant as the case may be. It is followed by a covenant on the part of the lessee that in the sixth, thirteenth, and twentieth year of the term he shall cause all the outside wood and iron work belonging to the farmhouse, stables, and other buildings to be hereafter erected to be painted, and so on, and the same premises being so well repaired and maintained as aforesaid at the end or other determination of the term shall quietly and peaceably surrender and yield up; and then at the end of the lease there is a provision that if the lessee shall be desirous of determining the present lease he must pay all the rent and observe all the covenants hereinbefore reserved and contained and on the part of the lessee to be paid, observed, and

(1) L. R. 9 Ex. 151.

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performed. I think, reading those covenants together, the whole document contemplates the keeping in repair by the tenant; and it is to be observed that the question of painting is the subject of a separate covenant, and, as every one knows, when you paint a house the bill is generally sent in to you for the amount of paint and the men's time; if so, under the first of the two clauses it would be one of those materials which would come under the operation of the clause.

There is a statement, not quite in point, but material to this question, by Lord Blackburn in the case of *Mackay* v. *Dick* (1), in which he says: "I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect." I do not say that that applies exactly to the present case; but it is an indication of the view the later cases have taken of these conditions and qualifications of covenants. I should want much clearer authority on the point to feel compelled to hold that the lessor could, by refraining from calling upon the tenant to repair, place the whole burden of repairs, which may be necessary for habitation, upon the lessee and thereby escape any obligation to provide materials for such repairs, the lessee remaining liable for the rent. One may readily suppose that the lessee calculated his rent on the supposition as to the amount necessary for the repairs, lessened by the material to be supplied by the lessor.

I think, therefore, on the whole, though of course diffidently, that the words are capable of the construction that they are a covenant, and that such was the intention of the parties may be gathered from the terms of the instrument itself.

In regard to the question of the custom I agree with the rest of the Court.

Questions answered.

Solicitors for plaintiff: *H. H. Wells & Co.*

Solicitors for defendant: *Savery & Stevens.*

(1) 6 App. Cas. 251, 263.

J. H. W.

[IN THE COURT OF APPEAL.]

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Jan. 19.

GREEN *v.* ALL MOTORS, LIMITED.

[1915 G. 1841.]

Lien—Hire-purchase Agreement—Contract by Hirer to keep Hired Chattel in repair—Chattel sent to Repairer—Lien as against Owner for Cost of Repairs.

By a hire-purchase agreement the plaintiff let a motor car to a person who agreed to "keep the car in good repair and working condition"; and the car was to be the property of the plaintiff until all the instalments were paid. During the currency of the agreement the car was injured by an accident and the hirer sent it to the defendants to be repaired. The defendants were informed that the car was held on a hire-purchase agreement. After the car was sent to the defendants, and before the contract for the repairs was made, default was made in payment of an instalment under the hire-purchase agreement. The plaintiff did not terminate the agreement until after the repairs had been commenced, when he demanded the car from the defendants, but did not tender the amount then due for the cost of the repairs. The defendants refused to deliver it up, claiming a lien on the car for the cost of the repairs; and the repairs were subsequently completed:—

Held, that the defendants had a lien on the car as against the plaintiff for the cost of the repairs.

Keene v. *Thomas* [1905] 1 K. B. 136 approved.

APPEAL from the judgment of Lush J. at the trial of the action without a jury.

The action was brought to recover possession of a motor car, and damages for its detention.

By an agreement dated July 28, 1915, the plaintiff, who was the owner of the motor car, let the car on hire to one Price (therein called "the hirer"), and in consideration thereof the hirer agreed: "1. To pay to the owner on the execution hereof a rent or hire instalment of 50*l*., another 50*l*. on the 20th day of August, and 65*l*. on the 20th day of October next. 2. The hirer shall keep the car in good repair and working condition (damage by fire and other occurrence included but ordinary and fair wear excepted) and shall keep the same in his own possession and shall not remove or permit to be removed the registered number or name plate affixed thereto·

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3. If the hirer do not duly perform this agreement or if he commit any act of bankruptcy or if he shall suffer his effects to be distrained upon or taken in execution or allow any judgment against him to remain unsatisfied then and in any of such cases the owner may (without prejudice to his rights under this agreement) terminate the hiring and retake possession of the car, and for that purpose leave and licence is hereby given to the owner to enter any premises occupied by the hirer or of which the hirer is tenant to retake possession of the car. 4. If the hirer is in arrear with any instalment for more than seven days the whole balance payable under clause 1 hereof shall immediately become due." The owner agreed: "1. That if the hirer shall make all payments and observe all the conditions on his part hereinbefore contained the car shall become the sole and absolute property of the hirer. 2. Unless and until all moneys payable under this agreement be paid the car shall be and continue to be the sole property of the owner."

The two instalments of 50*l.* each were duly paid to the plaintiff. On some date between August 20 and September 20 the car was damaged, owing, it was said, to a collision, and in consequence the car ceased to be in running order and required repairs. The car was sent to Mitchells' Garage in Wardour Street, and on September 21 Price asked the defendants for an estimate for repairing the car, and instructed them to take the car away from Mitchells' Garage and to pay the latter what was due to them in respect of the car. The learned judge found as a fact that Price then told the defendants that the car was subject to a hire-purchase agreement. On October 8 the defendants took the car away and paid Mitchells' Garage 2*l.* 1*s.* 6*d.* Default was made in payment of the instalment of 65*l.* in respect of the hire of the car which fell due on October 20. On October 26 the defendants submitted to Price an estimate of 31*l.* 2*s.* 6*d.* for the cost of the repairs to the car, and on October 31 Price accepted the estimate and directed the defendants to proceed with the work. The repairs were accordingly begun on November 4, and on November 6 Price wrote to the defendants to do some small extra repairs to the car. On November 16 the plaintiff, who had then ascertained that the car was being repaired by the defendants, wrote them a letter stating that the car was his property and not Price's, adding: "When the car

is ready for delivery please inform me and I will come and fetch it away, and on no account must the car be given to any other person but myself." The defendants wrote to the plaintiff in reply that they could not accept instructions from him in regard to property entrusted to them by other people. On November 18 the plaintiff called at defendants' premises with the hire-purchase agreement and demanded the car, which the defendants refused to deliver up on the ground that they had a lien for the cost of the repairs. On November 19 the writ in the action was issued. On December 6 it was ordered that on payment by the plaintiff into Court of 31*l.* 2*s.* 6*d.* to abide the event of the action the defendants should forthwith deliver the car to the plaintiff, and that there should be a speedy trial of the action under Order L., r. 1A, without pleadings. The money was paid into Court, and the car was accordingly given up. The Court of Appeal, as will be seen, came to the conclusion upon the evidence that the plaintiff had not terminated the hiring agreement before the contract for the repairs was made. It appeared that when the plaintiff wrote the letter of November 16 to the defendants and demanded the car from them the repairs had not been finished, but the plaintiff did not offer to pay the defendants for the repairs done up to that date or tender any sum in respect thereof. The repairs were subsequently completed.

Lush J. gave judgment for the plaintiff and ordered the money in Court to be paid out to him. The defendants appealed.

C. C. Scott, K.C., and *G. H. Stutfield*, for the defendants. The hirer of the car was under a duty to keep the car in repair, and for that purpose he could send it to the repairers' premises for the purpose of having the repairs done. The hirer had authority from the plaintiff, until the hire-purchase agreement was determined, to have the car repaired, when necessary, on the ordinary terms, one of which was that the repairers should have a lien on the car for the proper cost of the repairs: *Keene* v. *Thomas*. (1) The present case is perhaps a stronger one than that, because in that case, as appears from the report in the *Law Journal* (2), the dog-cart was sent to the defendant for repairs after the hirer had made default in paying an instalment due under the hire-purchase agreement.

(1) [1905] 1 K. B. 136. (2) 74 L. J. (K.B.) 21.

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In the present case no default had been made in payment when the motor car was sent to the defendants to be repaired. Even apart from the express obligation of the hirer to keep the car in repair, he had implied authority to have it repaired when necessary to enable it to be used as a motor car, and as incidental thereto to give a lien to the repairers for the cost of the work: *Williams* v. *Allsup* (1); *Singer Manufacturing Co.* v. *London and South Western Ry. Co.* (2) The cases of *Keene* v. *Thomas* (3) and *Singer Manufacturing Co.* v. *London and South Western Ry. Co.* (2) were both referred to with approval by Buckley L.J. in *Cassils & Co.* v. *Holden Wood Bleaching Co.* (4) In the present case the car was sent to the defendants on October 8, and on October 31 the hirer made the contract with the defendants for the repairs to the car. The plaintiff had not then put an end to the hire-purchase agreement. The plaintiff had to exercise his election to determine the agreement: *Davenport* v. *Reg.* (5) The work was begun on November 4 and the first demand made by the plaintiff for the return of the car was on November 16 or 18. The plaintiff therefore did not determine the agreement until November 16 or 18, that is, after the contract for the repairs had been made.

G. W. H. Jones, for the plaintiff. The defendants have to show that the hirer had authority from the plaintiff to create a lien on the car for the repairs done to it. The hire-purchase agreement expressly puts the obligation of having the car repaired when necessary upon the hirer and not upon the plaintiff. The effect of allowing the defendants' lien would be to cast the obligation of paying for the repairs upon the plaintiff. The learned judge has found as a fact that the defendants were told when they took the car to repair it that Price had it on a hire-purchase agreement. They knew, therefore, what was Price's position with regard to the car.

Further, upon the evidence the plaintiff had determined the hire-purchase agreement before the contract for the repairs was made. Even if that were not so, the agreement was determined before the repairs had been commenced. There is no authority

(1) (1861) 10 C. B. (N.S.) 417.
(2) [1894] 1 Q. B. 833, per Collins J. at p. 837.
(3) [1905] 1 K. B. 136.
(4) (1914) 84 L. J. (K.B.) 834, 840, 841.
(5) (1877) 3 App. Cas. 115, 128, 129.

to the effect that a lien exists in respect of an executory contract; it is only given for work and labour done. Even if the repairs had been commenced before the hire-purchase agreement was determined, hardly any had been done at the time when the plaintiff on November 16 and 18 demanded the return of the car from the defendants. The defendants had no right after that date to go on with the repairs, and it would not be proper to impose upon the plaintiff the obligation of paying for the repairs done after that date when the plaintiff determined the bailment.

No reply was called for.

SWINFEN EADY L.J. This is an appeal by the defendants from the judgment of Lush J. at the trial of the action without a jury. The plaintiff claimed the return of a motor car and damages for its detention. The defendants in answer thereto alleged that they had a lien on the car for 31*l.* 2*s.* 6*d.*, the cost of the repairs to the car. Under an order at chambers the plaintiff paid that sum into Court, and the car was returned to the plaintiff. The question, therefore, is whether the defendants had at the time of action brought a lien for 31*l.* 2*s.* 6*d.* for the cost of the repairs to the car.

The facts are these. The plaintiff let a motor car to Price on a hire-purchase agreement dated July 28, 1915. By the terms of the agreement Price was to pay an instalment of 50*l.* on July 28 and a further instalment of 50*l.* on August 20. Both these instalments were paid, leaving a balance due of 65*l.* which was payable on October 20. The agreement provided that the hirer should "keep the car in good repair and working condition (damage by fire and other occurrence included but ordinary and fair wear excepted)." It also provided that if the hirer did not duly perform the agreement the owner might terminate the hiring and retake possession of the car; and that upon payment of all the instalments the car was to become the property of the hirer. Before the date for the payment of the final instalment fell due the car was so damaged as to cease to be in running condition. We are told that it was damaged by a collision; at any rate the damage was not due to "ordinary and fair wear." The car in consequence required repairs, and it was sent to Mitchells' Garage. Price then communi-

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cated with the defendants with reference to repairing the car, and on October 8 the defendants took the car from Mitchells' Garage. That was twelve days before the final instalment fell due. The defendants submitted an estimate for the repairs, and on October 31 Price accepted the estimate and directed the defendants to proceed with the repairs. According to the evidence the plaintiff has not established that down to that date he made any application for redelivery of the car to him or in any way terminated the hiring. He did not learn until November 16 that the car was in the possession of the defendants, and until that date he made no demand for possession of the car from the defendants. The result is that the plaintiff has not shown any demand by him for the car so as to terminate the hiring agreement before the contract for the repairs was made between Price and the defendants.

In these circumstances the question is whether the defendants had a lien on the car. By the agreement Price had to keep the car in good repair and working condition. As the car was not in working condition there was an obligation on Price to repair it. The car would have to be repaired by a skilled person, and it was within the contemplation of the parties at the time they made the contract that the car might have to be sent to a repairing establishment to be repaired. That being so, the defendants would have a lien on the car for the reasonable cost of the work of repair. It is not suggested that the sum charged is unreasonable. In *Williams* v. *Allsup* (1) there was a mortgage of a ship, and the ship remained with the sanction of the mortgagees, the plaintiffs, in the possession and under the control of the mortgagor. The ship being out of repair, the mortgagor delivered her to the defendant, a shipwright, who took possession of her and effected the repairs. The defendant claimed a lien on the ship. Willes J. said (2): "By the permission of the mortgagees the mortgagor has the use of the vessel. He has, therefore, a right to use her in the way in which vessels are ordinarily used. Upon the facts which appear on this case, this vessel could not be so used unless these repairs had been done to her. The state of things, therefore, seems to involve the right of the mortgagor to get the vessel repaired, not on the credit of the mortgagees, but upon the ordinary terms, subject to the ship-

(1) 10 C. B. (N.S.) 417. (2) 10 C. B. (N.S.) 427.

wright's lien." Those remarks are applicable to the present case. Price was entitled to use the car in the way in which motor cars are ordinarily used, and he could not do so unless the car was repaired. Moreover, he was under an express obligation to get the car repaired. Therefore he had a right to get the car repaired upon the ordinary terms, that is to say, not upon the credit of the owner, but upon the terms that the repairer should have a lien on it for the reasonable cost of the repairs. That does not press hardly upon the owner, because, as Erle C.J. pointed out in the same case (1): "But it is to be observed that the money expended in repairs adds to the value of the ship; and, looking to the rights and interests of the parties generally, it cannot be doubted that it is much to the advantage of the mortgagee that the mortgagor should be held to have power to confer a right of lien on the ship for repairs necessary to keep her seaworthy." The same principle was applied in *Keene* v. *Thomas* (1)—the case of a hire-purchase agreement in respect of a dog-cart—where Lord Alverstone C.J. said: "The principle laid down by Collins J. in the case of *Singer Manufacturing Co.* v. *London and South Western Ry. Co.* (2) goes a long way to support the proposition that the hirer is entitled to use the hired chattel for all reasonable purposes, and in my opinion in this case the hirer of the chattel having undertaken to keep it in repair, and having at any rate a duty to take care of it, and having employed the defendant to repair it, has created a lien in respect of the proper cost of the repairs, not only against himself, but also against the plaintiff, the owner of the trap." That decision of a Divisional Court was referred to with approval by the Court of Appeal in *Cassils & Co.* v. *Holden Wood Bleaching Co.* (3) In *Keene* v. *Thomas* (1) at the time when the cart was sent to the defendant for repair an instalment under the hire-purchase agreement was in arrear, but the agreement had not been terminated. The present is even a stronger case, because at the time when the car was sent to the defendants to be repaired no default had been made in payment of an instalment. In these circumstances the defendants had a valid lien on the car for the proper cost of the repairs. Judgment must therefore be entered for the defendants,

(1) [1905] 1 K. B. 136, 138. (2) [1894] 1 Q. B. 833.
(3) 84 L. J. (K.B.) 840.

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and there must be an order for payment to them of the sum of 31*l.* 2*s.* 6*d.* which was paid into Court.

BANKES L.J. I agree. The materials which are before us are unsatisfactory, and I should have wished for more complete materials, especially with regard to what the learned judge actually decided. But upon the materials before us in my opinion the decision of the learned judge was wrong. In *Keene* v. *Thomas* (1) the point, as stated by Lord Alverstone C.J., was "whether the man who made the bargain with the repairer had authority from the plaintiff to make such a bargain." That is the first point to be decided. The question, therefore, is whether on October 31, when Price made the bargain with the defendants for the repair of the motor car, he had authority from the plaintiff to do so. In my opinion he clearly had authority unless the plaintiff had determined the hire-purchase agreement before that date. So far as I can judge from the materials before us, this point was not in question in the Court below. That was not the issue which the plaintiff elected to fight. The issue which, as it appears to me, he elected to fight was whether any, or any substantial part, of the repairs had been done when the hire-purchase agreement was terminated. The reason I say this is because counsel for the plaintiff cited to the learned judge the case of *Wehner* v. *Dene Steam Shipping Co.* (2), where it was held that a shipowner is not entitled to exercise a lien on freight in the hands of the ship's agent for charterparty hire accruing due. What the ground was upon which the learned judge based his decision I cannot gather, but the real question on the facts before us is whether the plaintiff has proved that he determined the hire-purchase agreement before the order for the repairs was given and accepted. Unless he establishes that he fails. He did not establish it. In my view the fair inference from the evidence is that the agreement was not terminated when the order for the repairs was given and accepted. The defendants are therefore entitled to judgment.

SCRUTTON L.J. I am of the same opinion. I agree that it is not clear upon what ground the learned judge based his judgment, nor is it clear what points were argued before him by the plaintiff.

(1) [1905] 1 K. B. 136, 137. (2) [1905] 2 K. B. 92.

Counsel for the plaintiff cited to the learned judge *Wehner* v. *Dene Steam Shipping Co.* (1), but I fail to see what it has to do with this case. The materials before us are very unsatisfactory. The plaintiff is the owner of a motor car, and he sues the defendants, who are in possession of the car, in detinue. The defendants say that the car was given to them to repair by the person who had it under a hire-purchase agreement, that they have a lien on it for the cost of the repairs, and that the plaintiff has never tendered to them the amount properly expended on the repairs. The law is clear. The hirer of a chattel is entitled to have it repaired so as to enable him to use it in the way in which such a chattel is ordinarily used. The hirer was therefore entitled, without any express authority from the owner, to have the motor car repaired so as to enable him to use it as a motor car is ordinarily used. That is well put by Willes J. in *Williams* v. *Allsup* (2) in the passage which has been read by Swinfen Eady L.J., and by Collins J. in *Singer Manufacturing Co.* v. *London and South Western Ry. Co.* (3) In the present case the hirer of the car had the express duty imposed upon him of keeping the car in repair, and therefore of having it repaired when necessary. That makes this case similar to *Keene* v. *Thomas* (4), which was a decision of a Divisional Court. Accordingly the hirer had by contract a duty as well as a right, until the hire was terminated, to have the car repaired, with the ordinary consequence of giving the repairer a lien on the car for the proper cost of the repairs. Had the bailment been determined when the order to do the repairs was given by the hirer? Upon the evidence the plaintiff has left it in doubt at what date he determined the bailment. As late as November 6 the hirer was giving orders for repairs to be done to the car, which he could not have done unless he had then a right to have possession of the car. The plaintiff therefore has failed to prove it.

A further question suggests itself to my mind which might give rise to some difficulty. If the plaintiff had told the defendants before the repairs were completed not to do any more repairs and had tendered to them the sum due for the work done, could the defendants have claimed a lien for the contract price of the repairs?

(1) [1905] 2 K. B. 92.
(2) 10 C. B. (N.S.) 427.
(3) [1894] 1 Q. B. 837.
(4) [1905] 1 K. B. 136.

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Scrutton L.J.

There is a nisi prius case of *Lilley* v. *Barnsley* (1) in which the argument of counsel and the ruling of Rolfe B. suggest that the repairers would only have a lien for the cost of the work actually done. However, that is not what happened in this case, and therefore the question does not arise. The plaintiff did not on November 18 tender a sum for the cost of the work then done and tell the defendants to do no further work. The plaintiff in these circumstances was not entitled to the car on that date, and he cannot say that the defendants were wrong in going on with the repairs.

Appeal allowed.

Solicitors for plaintiff: *Bishop & Fenton-Jones.*
Solicitors for defendants: *Lloyd, Richardson & Co.*

W. F. B.

Applied. MAHER *v.* MAHER. [1951] 2 All E.R. 37.

Applied. MAHER *v.* MAHER [1951] P. 342

K. B. D. 1916

Aug. 22; *Sept.* 21; *Nov.* 10.

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Nov. 23.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

THE KING *v.* THE SUPERINTENDENT REGISTRAR OF MARRIAGES, HAMMERSMITH.

Ex parte MIR-ANWARUDDIN.

Husband and Wife—Mixed Marriage—Mahomedan domiciled in India and Christian Woman—Dissolution of Marriage—"Writing of Divorcement."

A marriage solemnized in this country between a Mahomedan domiciled in India and a Christian woman cannot be dissolved by the husband handing to the wife a "writing of divorcement," although that would be an appropriate mode of effecting the dissolution of a Mahomedan marriage according to Mahomedan law.

RULE NISI calling upon the respondent, the superintendent registrar of marriages, Hammersmith, to show cause why a writ of mandamus should not issue directed to him commanding him to issue a certificate in the form set forth in Sched. B to the Marriage

(1) (1844) 1 Car. & K. 344.

and Registration Act, 1856, and at the same time a licence authorizing the appellant to marry one Vyolet Louise Ling.

Under the Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 9, a statutory duty is imposed upon the superintendent registrar to issue a certificate and licence to marry "provided that no lawful impediment to the issue of such certificate be shown to his satisfaction." The applicant complained that the superintendent registrar had wilfully and without cause refused and neglected to issue the certificate and licence. The following statement of the facts is taken from the judgment of the Lord Chief Justice:

From the affidavit of the applicant it appeared that he, Dr. Mir-Anwaruddin, was a native of and domiciled in the province of Madras in India, and that he professed the religion of Islam and was subject to the law of the Koran. On March 18, 1913, he contracted a civil marriage in England with Ruby Pauline Hudd. On May 3, 1913, she deserted him and had ever since refused to cohabit with him. Subsequently the applicant filed a suit in the City Civil Court of Madras praying for a decree of restitution of conjugal rights, and on December 15, 1913, a decree of restitution was pronounced by the Court and was duly served upon her, but she had refused to obey it. In August, 1913, she commenced proceedings in the Divorce Division of the High Court of Justice in England for a judicial separation on the ground of alleged cruelty. The applicant had returned to India to practise as an advocate. By his instructions an objection was entered to the jurisdiction of the English Court on the ground that he was domiciled in India. Subsequently he abandoned this objection and returned to England to obtain a decision on the merits, but the wife did not proceed with the suit and her petition was dismissed.

On August 27, 1915, the applicant made a declaration of divorcement, which was headed "Talaknama" and was in the following terms: "To all and singular whom it may concern, Greetings. Whereas Ruby Pauline Mir-Anwaruddin, my lawfully wedded wife . . . . has of her own free will and accord left my protection and lived separately and apart from me since May 3, 1913, Whereas the said Ruby Pauline Mir-Anwaruddin has deliberately treated with contempt the decree and order of His Majesty's City Civil Judge at Madras, in the Empire of India, dated December 15, 1913, which

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commanded her to rejoin me and live with me at Madras, And whereas the Courts of His Majesty in England have no jurisdiction to try a suit for dissolution of my marriage owing to my being domiciled in India, and the Courts of His Majesty in the Empire of India have no jurisdiction to dissolve a marriage between parties who do not profess the religion of Christ, I have no alternative but to exercise my privilege as a Mohamedan, which I hereby do, by pronouncing Talak in the name of God and His Holy Prophet Mohamet (on whom be peace)." This document was dated August 27, 1915, and was signed by the applicant in the presence of two witnesses at Walter House, Strand, W.C. According to the affidavits filed on behalf of the applicant this declaration of divorcement has, under Mahomedan law, the effect of dissolving the marriage. The evidence was that under Mahomedan law a Mahomedan is permitted to have four wives at the same time, and he may marry a "Kitabia," that is, a person "who believes in a revealed religion, namely, Mahomedanism, Christianity and Judaism, but not an idolatress or a fire worshipper." Under Mahomedan law he can dissolve any of his marriages by a mere declaration of his will and pleasure to that effect. This declaration is called "Talak" (1); it may be made verbally and in the absence of the wife and without any reason being assigned. It does not require the intervention of a Court of law, and it takes effect from the moment of pronouncement and is irrevocable. It was stated that it applies equally to a Christian as to a Mahomedan wife, and that according to the Mahomedan law administered in Courts of justice in India such a declaration of divorcement pronounced by a Mahomedan husband is valid for all purposes.

In order to ascertain his position in England the applicant presented a petition in the Probate and Divorce Division of the High Court of Justice for a decree (1.) declaring that the marriage had been dissolved, and (2.) alternatively for dissolution of the marriage on the ground of the misconduct of the wife. The registrar refused to admit the petition on the ground that the petitioner was not domiciled in this country. On appeal Bargrave Deane J. in July, 1916, upheld the registrar's decision, and added that in his judgment

(1) [A manifest slip for "talak-nama": "talak" is the divorce itself, see Wilson's Glossary, *s.v.*]

the marriage had been dissolved according to law, and that as there was no subsisting marriage the Court could not pronounce a decree. Subsequently, in August, 1916, the applicant applied to the superintendent registrar for a certificate and licence to marry Vyolet Louise Ling. The application was refused, and thereupon the applicant applied to the Divisional Court for the present rule nisi for a mandamus, which was granted.

Aug. 22. *Sir G. Cave, S.-G.*, and *G. A. H. Branson* showed cause. The marriage which has taken place is valid according to the law of England and cannot be dissolved by a mere declaration by one party to it. It can only be dissolved either by the decree of a Court in this country or of a Court in the country of the husband's domicil. The declaration of divorcement only applies to a Mahomedan marriage. The custom which enables a Mahomedan to dissolve a marriage by his own volition has no application to an English marriage. A Mahomedan marriage is according to English law no marriage. It is a polygamous marriage, while English law only recognizes the marriage for life of one man to one woman: *Hyde* v. *Hyde and Woodmansee.* (1) If it is part of a contract of marriage that the man may have another or other wives it is not a marriage in the eye of the English law. The power to dissolve the marriage at will is a term of a Mahomedan marriage but not of an English marriage. By the comity of nations or some similar principle one nation recognizes that the Courts of the other nation can dissolve a marriage between its subjects, but in the present case one party is a Mahomedan and the other an Englishwoman, and the English Courts would not recognize a decree of an Indian Court. The Indian Courts would have no jurisdiction to dissolve this marriage: *Warrender* v. *Warrender.* (2)

But if this Court should take the view that the writing of divorcement dissolved the marriage, the marriage which the applicant wishes to contract is not a marriage for which it is the duty of the registrar to grant his certificate and licence. According to the applicant's own case the marriage would be dissolvable at will. The position of the registrar is that he will not help the applicant to

(1) (1866) L. R. 1 P. & M. 130. (2) (1835) 2 Cl. & F. 488.

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contract a marriage the incidents of which are contrary to English law. [*In re Bethell* (1) was also referred to.]

The Applicant in person. The registrar has refused to perform the duty imposed upon him by s. 9 of the Marriage and Registration Act, 1856. No question with regard to polygamous rights conferred by Mahomedan law arises in the present case. The judgment, of Bargrave Deane J. is entitled to respect although it may not bind this Court. The registrar has a purely ministerial, not a judicial, duty. In s. 9 of the Act of 1856 the word "show" means that some person other than the parties to the marriage must go to the registry and object to the marriage taking place by showing some lawful impediment. The registrar cannot arbitrarily refuse to issue the certificate and licence. No discretion is vested in him unless a lawful impediment is shown. He ought to have accepted the judgment of Bargrave Deane J. that the original marriage was dissolved. The validity of a marriage depends upon the law of the place where the marriage is contracted, but a divorce involves a question of status, and therefore the law of the place of domicil applies: *Harvey* v. *Farnie*. (2) There is nothing in that decision which shows that a decree of a Court is necessary to dissolve a marriage. *Ganer* v. *Lady Lanesborough* (3) shows that the Courts have recognized a decree not made by a Court. *Armitage* v. *Attorney-General* (4) shows that if I married a lady now according to Mahomedan law I should be liable to a prosecution for bigamy. If an English Christian woman marries a Mahomedan she remains a Christian but becomes liable to the law of the husband's domicil: *Chetti* v. *Chetti*. (5) The registrar was bound to take notice of the fact that the original marriage had ceased to exist, and therefore had no discretion which entitled him to refuse to issue the certificate and licence. [*Skinner* v. *Skinner* (6), *Niboyet* v. *Niboyet* (7), and *Le Mesurier* v. *Le Mesurier* (8) were also referred to.]

Cur. adv. vult.

(1) (1888) 38 Ch. D. 220.
(2) (1882) 8 App. Cas. 43.
(3) (1790) 1 Peake, 25.
(4) [1906] P. 135.
(5) [1909] P. 67.
(6) (1897) L. R. 25 Ind. Ap. 34.
(7) (1878) 4 P. D. 1.
(8) [1895] A. C. 517.

Nov. 10. VISCOUNT READING C.J. read the following judgment :— Dr. Mir-Anwaruddin applies to this Court for a mandamus directed to the superintendent registrar of marriages in the district of Hammersmith commanding him to issue a certificate and licence authorizing Dr. Mir-Anwaruddin to marry one Vyolet Louise Ling. Under the Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), s. 9, a statutory duty is imposed upon the superintendent registrar to issue a certificate and licence to marry "provided that no lawful impediment to the issuing of such certificate be shown to his satisfaction." The complaint of Dr. Mir-Anwaruddin is that the superintendent registrar has wilfully and without cause refused and neglected to issue the certificate and licence. [His Lordship having stated the facts as above continued :]

The case raises an important question, namely, whether the declaration of divorcement made by the applicant has the effect in England of dissolving a marriage contracted according to English law so as to entitle the applicant to marry again in this country. Dr. Mir-Anwaruddin's contention is that according to English law the dissolution of a marriage celebrated here is regulated by the law of the domicil of the husband, and that as his domicil is Indian and the law in India follows and applies the Mahomedan law, a divorce by a Mahomedan husband recognized in India as valid must be accepted as valid for all purposes in English law.

The Solicitor-General, in showing cause against the rule, did not dispute the evidence relating to Mahomedan law, but contends that the right according to Mahomedan law to dissolve a marriage is not applicable in England to a marriage celebrated in England according to English law with a woman domiciled in England. If the Court should be of a contrary opinion he would contend that the registrar was not compellable at law to issue a certificate and licence to a person who wishes to contract a marriage of which the incidents are contrary to English law.

Dr. Mir-Anwaruddin does not dispute the validity of the marriage and admits that so long as the marriage subsists he cannot marry again in England according to English law.

I deal with the present case on the basis of the validity of the marriage contracted with Ruby Hudd. Indeed I do not think it would be open to the applicant, if he desired it, to question the

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legality of the marriage. I have no doubt that the marriage was a valid marriage according to the law of England. That follows, I think, from the reasoning in the learned judgment of Sir Gorell Barnes, President, in *Chetti* v. *Chetti.* (1) In that case the respondent, a Hindu domiciled in India, then temporarily resident in this country, was married to an Englishwoman at a registrar's office in London. The wife petitioned for a judicial separation on the ground of desertion. The respondent filed an answer denying the legality of the marriage and alleging that at the time of its celebration he was and remained a Hindu domiciled in India, that by Hindu religion and law he could not marry outside his caste or any one who was not by religion a Hindu, and that by Hindu law plurality of wives was permissible. It was held that the marriage was valid and that a person who contracts such a marriage in this country cannot be allowed to repudiate it. In my judgment it follows from the opinions expressed by the learned President and upon the general principles there stated that a person who by the Mahomedan law is permitted to have four wives cannot, on the ground that English law only recognizes a monogamous marriage, set up the illegality of a marriage contracted here. He chose voluntarily to enter into it in England according to English law with a woman domiciled here. It is not contended that there is a law applicable to Mahomedans domiciled in the Empire of India making it incumbent upon a Mahomedan to have more than one wife or forbidding him to enter into a monogamous marriage if he so pleases. The question we have to decide in the present case is whether the declaration of divorcement dissolves the marriage of the parties in this country. If the marriage was not dissolved there was a lawful impediment to the second marriage of the applicant which justified the registrar in refusing the certificate and licence.

Marriage according to English law, and as understood in all Christian countries, has been defined by the Judge Ordinary (Lord Penzance) in *Hyde* v. *Hyde and Woodmansee* (2) as "the voluntary union for life of one man and one woman to the exclusion of all others." "Marriage in Christian countries," "Christian marriage," "marriage in Christendom," or some equivalent, are phrases used for convenience to express this idea. The idea to be expressed, as

(1) [1909] P. 67. (2) L. R. 1 P. & M. 130, 133.

Sir James Hannen, President, said in *Brinkley* v. *Attorney-General* (1), is "that the only marriage recognised in Christian countries and in Christendom is the marriage of the exclusive kind I have mentioned." In *Niboyet* v. *Niboyet* (2) Brett L.J. said: "Marriage is the fulfilment of a contract satisfied by the solemnization of the marriage, but marriage directly it exists creates by law a relation between the parties and what is called a status of each. . . . . That relation between the parties, and that status of each of them with regard to the community, which are constituted upon marriage are not imposed or defined by contract or agreement but by law." Sir James Hannen, President, in *Sottomayer* v. *De Barros* (3), said: "In truth, very many and serious difficulties arise if marriage be regarded only in the light of a contract. It is indeed based upon the contract of the parties, but it is a status arising out of a contract."

The status of marriage as understood by the law of England is conferred by entering into the contract of marriage. Once the marriage has been celebrated according to the law of the place where it is celebrated the status of marriage with all its incidents is conferred by law upon the parties. In *Harvey* v. *Farnie* (4) it was decided that where an Englishwoman marries a domiciled foreigner the marriage is constituted according to the lex loci contractus, but she takes his domicil and is subject to his law. Lord Selborne L.C. said: "When a marriage has been duly solemnized according to the law of the place of solemnization, the parties become husband and wife. But when they become husband and wife what is the character which the wife assumes? She becomes the wife of the foreign husband in a case where the husband is a foreigner in the country in which the marriage is contracted. She no longer retains any other domicil than his, which she acquires. The marriage is contracted with a view to that matrimonial domicil which results from her placing herself by contract in the relation of wife to the husband whom she marries, knowing him to be a foreigner, domiciled and contemplating permanent and settled residence abroad. Therefore it must be within the meaning of such a contract, if we are to inquire into it, that she is to become subject to her husband's law, subject to it in respect of the consequences of the matrimonial relation and

(1) (1890) 15 P. D. 76, 80.
(2) 4 P. D. 1, 11.
(3) (1869) 5 P. D. 94, 101.
(4) 8 App. Cas. 43, 50.

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all other consequences depending upon the law of the husband's domicil." That case established the general principle of English law that the lex fori of the husband's domicil can dissolve a marriage celebrated in England and for a cause which would not support a petition for divorce in this country. The cause of divorce was the adultery of the husband, which is sufficient ground according to the law of Scotland for a divorce by the wife of her husband. The English Courts acknowledged the divorce pronounced by the Court in Scotland as a decree of a Court of competent jurisdiction. The decree was not impeached by collusion or fraud, and the English Courts regarded it as a valid dissolution of the marriage contracted in England by a domiciled Scotchman with a domiciled Englishwoman on the ground that the dissolution of the marriage depended for its validity upon the lex fori of the husband's domicil. If in the present case it could be established that according to the law of India, which is the matrimonial domicil, a decree dissolving the marriage had been made by a Court of competent jurisdiction, it would raise the question whether a decree founded upon the husband's right to pronounce Talak would be recognized by our Courts as an effective divorce according to English law, entitling the applicant to marry again in this country. It must certainly not be inferred that such a decree of a foreign Court would be accepted by our Courts as dissolving the marriage contracted here. The Solicitor-General indicated that he desired that this point should be left open, and I wish to say nothing which would suggest that we should give effect to a decree based upon the right of one or even of both parties to dissolve the marriage at pleasure. Not only is there no such decree before the Court, but the exercise of the right of Talak by the applicant is explained and justified by him on the ground that he cannot obtain a decree of divorce from the Courts of India or of England. His statement is that as there is no jurisdiction in the Courts of India to decree the dissolution of his marriage, and as the Courts of England have no jurisdiction because Dr. Mir-Anwaruddin's domicil is India, he is left without other remedy than that provided by the law of the Koran, which is the Mahomedan law. In my judgment the explanation is fatal to the present application. Neither authority nor principle can be found in English law to establish the proposition that a marriage contracted in England is

dissolved according to the law of England by mere operation of the laws of the religion of the husband and without decree of a Court of law.

The law of his religion is the applicant's personal law ; it is not the general law applicable to all who are domiciled in India. It is not a law peculiar to India, but to Mahomedans wherever they may be domiciled. It is recognized by the Courts of India, as stated by Sir Gorell Barnes, President, in *Chetti* v. *Chetti*. (1) But the applicant is seeking to travel a very long way and over a hitherto unbridgeable gulf when he claims that the marriage he contracted with Ruby Hudd is dissolved in this country by the operation of the law of his religion. An Englishwoman or a woman domiciled in England who marries in England a person domiciled in Scotland, Ireland, or India, or elsewhere out of the realm of England, acquires by the status of marriage the domicil of the husband and is subject to the law of that domicil, but she does not acquire his religion or become subject to the laws of his religion except in so far as they are the law of his domicil, and then to that extent only.

Lord Selborne L.C. pointed out in *Harvey* v. *Farnie* (2) that the recognition by English law of the dissolution by the law of the matrimonial domicil of a marriage contracted in England depends upon the principle of recognizing the law of the forum and the matrimonial domicil when they both concur. In the present case the law of the forum, that is of the Courts of the Empire of India, admittedly does not assist the applicant, and in my view that by itself decides the case against him. It was decided in *Armitage* v. *Attorney-General* (3) that the Courts of this country will recognize the binding effect of a decree of divorce obtained in a State where the husband was not domiciled, if the Courts of the country or State of his domicil would recognize the validity of the decree. That is the furthest extent to which recognition by our Courts has gone. In the present case there is not a decree of any Court, and therefore that question does not arise.

Dr. Mir-Anwaruddin placed much reliance upon the judgment of Bargrave Deane J. It is, however, not binding upon this Court. It was not necessary for the decision in this case and was given in the

(1) [1909] P. 67. (2) 8 App. Cas. 43, 51.
(3) [1906] P. 135.

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absence of the wife and without argument being presented on her behalf. With all respect, therefore, to that learned judge's opinion, it has not the same weight as if it had been formed after hearing full argument.

I am of opinion that the rule must be discharged.

DARLING J. read the following judgment:—I am of the same opinion. Dr. Mir-Anwaruddin has obtained a rule calling on the superintendent registrar of marriages in Hammersmith to show cause why a writ of mandamus should not issue directed to him commanding him pursuant to the statutes in that behalf to issue under his hand a certificate in the form or to the effect of the certificate set forth in the Sched. B annexed to the Marriage and Registration Act, 1856, and at the same time a licence authorizing the said Mir-Anwaruddin to marry Miss Vyolet Louise Ling, on the ground that the said superintendent registrar has wilfully and without cause refused and neglected to issue the said certificate and licence.

The question is whether any "lawful impediment to the issuing of such certificate is shown" within the meaning of the Marriage and Registration Act, 1856, s. 9. It appears by Dr. Mir-Anwaruddin's affidavit that he was born and is by religion a Mahomedan, and that on March 18, 1913, at the office of the superintendent registrar at Wandsworth he lawfully married one Ruby Hudd, who is still living. Dr. Mir-Anwaruddin claims that she is no longer his wife because he has by a declaration of divorce dated August 27, 1915, himself dissolved that marriage according to the requirements of Mahomedan law. The domicil of Dr. Mir-Anwaruddin is, and has always been, an Indian one, and that, on his marriage with Ruby Hudd, became her domicil also. The Divorce Court in England cannot entertain a suit at the instance of either of these persons by reason of their foreign domicil. Ruby Hudd is by religion a Christian, and the Divorce Courts of India cannot entertain such a suit between parties not of the same religion. For these reasons Dr. Mir-Anwaruddin has had recourse to what he conceives to be his personal jurisdiction under Mahomedan law, and has himself decreed Talak, or dissolution of his marriage with Ruby Hudd. It appears that Talak is an arbitrary right to be exercised by the Mahomedan husband whenever he may feel so inclined. It

is evident that what in English language and English law is called marriage differs widely from what is so known amongst Mussulmans. Here in England, in the mosque at Woking, Dr. Mir-Anwaruddin might, as he told us, have contracted a marriage in the Mahomedan form and sense; but the very attributes of such a union would mark it as not resembling what in any Christian land is describable as marriage. In *Hyde* v. *Hyde and Woodmansee* (1) the Judge Ordinary (Lord Penzance) thus expressed himself: "Marriage has been well said to be something more than a contract, either religious or civil—to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of 'husband' and 'wife' is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite rights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others. There are no doubt countries peopled by a large section of the human race in which men and women do not live or cohabit together upon these terms—countries in which this Institution and status are not known. In such parts the men take to themselves several women, whom they jealously guard from the rest of the world, and whose number is limited only by considerations of material means. But the status of these women in no way resembles that of the Christian 'wife.' In some parts they are slaves, in others perhaps not; in none do they stand, as in Christendom, upon the same level with the man under whose protection they live. There are, no doubt, in these countries laws adapted to this state of things—laws which regulate the duties and define the obligations of men and women standing to each other in these relations. It may be, and probably is, the case that the women there pass by some word or name which corresponds to our

(1) L. R. 1 P. & M. 130, 133.

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word 'wife.' But there is no magic in a name; and, if the relation there existing between men and women is not the relation which in Christendom we recognise and intend by the words 'husband' or 'wife,' but another and altogether different relation, the use of a common term to express these two separate relations will not make them one and the same, though it may tend to confuse them to a superficial observer." It is to be observed that Dr. Mir-Anwaruddin tells us that by the Mahomedan law it is permissible to him to have four lawful wives. In my opinion the domicil affects the jurisdiction of the Court which might have occasion to consider questions arising out of the marriage contract, but does not alter the terms or conditions of the contract itself, and those are governed by the lex loci contractus, in this instance by the law of England, for there is nothing to show that when Dr. Mir-Anwaruddin married Ruby Hudd either he or she intended that the ceremony should confer upon her anything other than the status which the English law gives to a Christian wife, whether married in a register office or in a cathedral church. I think that this view is supported by what is said by Cotton L.J. in *Harvey* v. *Farnie*. (1) These are his words: "The fallacy lies in this: the word 'marriage' is used in two senses. It may mean the solemnity by which two persons are joined together in wedlock, or it may mean their status when they have been so joined. The solemnity by which they are united in marriage, that is to say, the mode in which the marriage is solemnised, and the forms to be followed, must depend upon the law of the country where that solemnity takes place. When the marriage takes place in a country which is not the country of the domicil the country of the domicil will hold the persons as duly married if they have followed the forms and ceremonies required by the country in which it is solemnised. Of course I am speaking only of Christian countries, and that gets rid of what was put to us by Mr. Fooks, that we have here to consider what would be the consequences of dealing with the law of the domicil supposing it were Turkish. The rule I apprehend prevails universally that where a marriage has been solemnised according to the form and in the manner required by the place where it is celebrated, it will be recognised in the country of the domicil, and being recognised in the country of the domicil the

(1) (1880) 6 P. D. 35, 47, 48.

persons will be recognised as married. That is their status." The status acquired by Ruby Hudd on her marriage with Dr. Mir-Anwaruddin is inconsistent with his claim that she became his wife during his pleasure and not for life, and that she became merely one of four possible wives. These words, used by Lush L.J. in *Harvey* v. *Farnie* (1), appear to me very applicable here: "Marriage in the contemplation of every Christian community is the union of one man and one woman to the exclusion of all others. No such provision is made, no such relation is created, in a country where polygamy is allowed, and if one of the numerous wives of a Mohammedan was to come to this country, and marry in this country, she could not be indicted for bigamy, because our laws do not recognise a marriage solemnised in that country, a union falsely called marriage, as a marriage to be recognised in our Christian country." It seems to me unreasonable to hold that Ruby Hudd intended to make such a contract as that for which Dr. Mir-Anwaruddin contends, and to acquire for herself, she being a Christian, a status far below that of any Christian wife; and that the intention of the parties should be regarded appears to me clearly laid down by Lord Brougham in *Warrender* v. *Warrender*. (2) He says: "But when the Courts of one country consider the laws of another in which any contract has been made, or is alleged to have been made, in construing its meaning, or ascertaining its existence, they can hardly be said to act from courtesy, ex comitate; for it is of the essence of the subject-matter to ascertain the meaning of the parties, and that they did solemnly bind themselves; and it is clear that you must presume them to have intended what the law of the country sanctions or supposes; it is equally clear that their adopting the forms and solemnities which that law prescribes, shows their intention to bind themselves, nay more, is the only safe criterion of their having entertained such an intention. Therefore the Courts of the country where the question arises, resort to the law of the country where the contract was made, not ex comitate, but ex debito justitiae; and in order to explicate their own jurisdiction by discovering that which they are in quest of, and which alone they are in quest of, the meaning and intent of the parties." The law as laid down by Lord Brougham is expressly recognized in later cases, and noticeably by Stirling J., as he then

(1) 6 P. D. 53. (2) 2 Cl. & F. 488, 530.

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was, in *In re Bethell* (1), where he says: "I have now to inquire what is the law applicable to the case. In *Warrender* v. *Warrender* (2) Lord Brougham said: 'A marriage, good by the laws of one country, is held good in all others where the question of its validity may arise. For the question always must be: did the parties intend to contract marriage? And if they did that which in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely, be considered otherwise than as intending a marriage contract.' This is the general rule of law and is relied on by the counsel for the infant. His Lordship, however, afterwards qualifies his statement of the rule as follows: 'But the rule extends, I apprehend, no further than to the ascertaining of the validity of the contract, and the meaning of the parties, that is, the existence of the contract and its construction. If indeed there go two things under one and the same name in different countries—if that which is called marriage is of a different nature in each—there may be some room for holding that we are to consider the thing to which the parties have bound themselves, according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe, that we regard it as a wholly different thing, a different status from Turkish or other marriages among infidel nations, because we clearly never should recognise the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate. . . . . Indeed if we are to regard the nature of the contract in this respect as defined by the lex loci, it is difficult to see why we may not import from Turkey into England a marriage of such a nature as that it is capable of being followed by and subsisting with another, polygamy being there of the essence of the contract.' That statement of the law was acted upon by Lord Penzance in the case of *Hyde* v. *Hyde and Woodmansee* (3), in dealing with the case of a Mormon marriage celebrated at Salt Lake City. He there says: 'The matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy,' and 'I conceive that marriage, as under-

(1) 38 Ch. D. 220, 233, 234.
(2) 2 Cl. & F. 488, 530, 531, 532, 533.
(3) L. R. 1 P. & M. 130, 133, 135.

stood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.' " Moreover, *Bethell's Case* (1) shows that as the Courts in the country of a husband's domicil may find that in a foreign land he contracted a union with the incidents of a marriage according to the laws of the country where it took place and not according to the laws of his domicil, so they may find to the contrary. Now if an Englishman may, by the Courts in England, be held to have in fact contracted in a foreign country a marriage according to the law of that country, holding that he might, had both parties so intended, have made the woman his wife according to the law of his own domicil, I see no reason why here, and in India also, the Courts should not apply to Dr. Mir-Anwaruddin the same rule of may or may not in regard to his marriage in England. Had he asked the registrar for a certificate to enable him to marry a Christian woman, not according to English law, but merely according to Mahomedan law, I think the registrar might lawfully have refused it, for his certificates relate to no such unions. In my judgment Dr. Mir-Anwaruddin has made a marriage, as he was legally entitled to do, to which Talak has no application.

For the opinions I have expressed I desire to rely on *Chetti's Case* (2), where Sir Gorell Barnes, President, said : " India, for the purposes of the jurisdiction of the Courts of this country, is a foreign country, though the case being dealt with is the case of a British subject from British India marrying an English girl with due form in England and now setting up in objection to the marriage that he has a personal disqualification when in India. Ought he to be allowed to do so ? Ought a foreigner domiciled abroad, who comes to this country and here marries in due form according to English law another person domiciled in England, to be allowed to assert that he carries about with him, while here, the burden of an incapacity imposed by the laws of the foreign domicil to do that which he has done voluntarily and in due form according to the laws of England, or to repudiate his marriage on the ground that he is incapable of doing what he has done, and ought our Courts to support such an assertion and repudiation, with the consequent effects on the position of the wife and legitimacy of the child ? To

(1) 38 Ch. D. 220. (2) [1909] P. 67, 87.

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my mind the answer should be 'No.'" Surely Dr. Mir-Anwaruddin can no more carry about with him an arbitrary undisclosed power to annul his contract than an actual incapacity to make it. Should Dr. Mir-Anwaruddin succeed in his contention here, he might demand of this registrar four certificates at once, and with the sanction of them might proceed to marry as many Englishwomen of the Christian faith; yet it is plain that not one of such unions could give the woman espoused the status of wife according to English law, for if it did those certificates would permit of polygamy, which our law forbids; they would indeed amount to licences to commit three separate felonies. At this juncture it is perhaps worth while to recall these words of Lord Brougham in *Warrender* v. *Warrender* (1): "If, in a matter confessedly not clear, and very far from being unincumbered with doubt and difficulty, we find that manifest and serious inconvenience is sure to result from one view, and very little, in comparison, from adopting the opposite course, nothing can be a stronger reason for taking the latter. Now surely it strikes every one that the greatest hardships must occur to parties, the greatest embarrassment to their rights, and the utmost inconvenience to the Courts of justice in both countries, by the rule being maintained as laid down in *Lolley's Case*." (2) *Lolley's Case* (2) is a well-known case that had been cited. It is hardly hyperbole to describe three prosecutions for bigamy as "a serious inconvenience." Those are Lord Brougham's words. Now *Lolley's Case* (2), as explained by Lord Lyndhurst in *Warrender's Case* (3), shows that Dr. Mir-Anwaruddin would be in grave peril should he treat in England a marriage contracted in an English church or register office with a Christian Englishwoman as being subject to all the incidents of one contracted merely according to Mahomedan law; yet this is precisely what, in applying to this Court for a mandamus, he asks us to declare that he is entitled to do.

In my judgment there is existing a "lawful impediment to the issuing of such certificate" as Dr. Mir-Anwaruddin has applied for. The superintendent registrar was therefore justified in his refusal, and this rule should be discharged.

(1) 2 Cl. & F. 488, 548. (2) (1812) Russ. & R. 237.
(3) 2 Cl. & F. 488, 558.

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VISCOUNT READING C.J. I will now read the judgment of BRAY J. This was an application by Dr. Mir-Anwaruddin for a mandamus to compel the superintendent registrar of marriages at Hammersmith to issue a certificate in accordance with the form in Sched. B of the Marriage and Registration Act, 1856, and a licence authorizing the applicant to marry Miss Vyolet Louise Ling, the registrar having, as he contended, without cause refused and neglected to issue such certificate and licence.

The facts do not appear to be in dispute. They are stated in the applicant's affidavit and so far as material are as follows: The applicant was born of Mussulman parents and professed the religion of Islam. His domicil throughout was in India. On March 18, 1913, at the superintendent registrar's office at Wandsworth he contracted a civil marriage with Ruby Pauline Mir-Anwaruddin, whose maiden name was Ruby Pauline Hudd, who professed the Christian faith. On May 3, 1913, his wife, as he contended, deserted him, and cohabitation was never resumed between them. Later she took various proceedings against him for a separation order, which ultimately failed. The applicant, who had come to this country from India in order to be called to the Bar, returned to India in June or July, 1913, and soon after filed a suit in the City Civil Court at Madras asking for a decree of restitution of conjugal rights, and on December 15, 1913, a decree of restitution was pronounced. His wife did not appear. The decree was served on her but was never obeyed. Meanwhile, in August, 1913, the wife took proceedings against the applicant in the High Court of Justice here for a judicial separation. Later she abandoned the suit and her petition was dismissed. On August 27, 1915, the applicant purported to dissolve the marriage by a writing of divorcement under the Mussulman law. He then, with the view of ascertaining his position in England, presented a petition in the Divorce Division of the High Court for a decree of dissolution of the marriage. This came before Bargrave Deane J. His wife did not appear, but it was argued before the learned judge in open Court, and the petition was dismissed. One of the grounds on which the learned judge dismissed the petition was that there was no marriage left to deal with as it had already been dissolved under Mahomedan law. The applicant then, namely, on August 12, 1916, gave a notice under s. 9 of the Marriage

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and Registration Act, 1856, of his intention to marry one Vyolet Louise Ling, and applied for a certificate and licence to enable him to marry her, which the registrar ultimately refused to issue.

The Solicitor-General and Mr. Branson appeared before us to show cause. They contended that there was a lawful impediment to the marriage because the applicant was married, and his wife had not been validly divorced. The applicant contended that the question whether there had been a valid divorce depended upon the law of the country where he was domiciled, i.e. India, and relied upon the judgment of Bargrave Deane J. which has been referred to. I think that learned judge clearly expressed his opinion on that point in favour of the applicant, but I do not think that this Court is bound by that decision. It was the decision of a single judge on a summons. The wife did not appear in that proceeding, and therefore the learned judge had not the benefit of hearing any argument on the other side. Further it was not necessary for the decision of the case, as the learned judge held also that the Court had no jurisdiction to dissolve the marriage. I think his decision must be regarded as a dictum, but no more than a dictum. I think the ground of the learned judge's decision was that this Court was bound to decide according to the law of the applicant's domicil. Affidavits were filed in his Court, and were read in this Court, to show that in the Indian Courts it would be held that there had been a good divorce, and I assume that it would have been so held. Reliance was placed by the applicant on the cases of *Harvey* v. *Farnie* (1) and *Le Mesurier* v. *Le Mesurier* (2); but in my opinion those cases do not support the proposition. In the latter case Lord Watson says: "When the jurisdiction of the Court is exercised according to the rules of international law, as in the case where the parties have their domicil within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every civilized country." In *Harvey* v. *Farnie* (1) all the previous cases were very carefully reviewed. The head-note, which I think states the decision correctly, is "The English Courts will recognise as valid the decision of a competent foreign Christian tribunal dissolving the marriage between a domiciled native in the country where such tribunal has jurisdiction, and an Englishwoman,

(1) 8 App. Cas. 43. (2) [1895] A. C. 517, 527.

when the decree of divorce is not impeached by any species of collusion, or fraud. And this, although the marriage may have been solemnized in England, and may have been dissolved for a cause which would not have been sufficient to obtain a divorce in England." That is a different thing. These cases do not decide that the Courts here will act on the law of the domicil. They decide that if there is a decree of a foreign Court that the marriage has been dissolved these Courts will regard that decree and act upon it. There has been no such decree here. The Courts in India have no jurisdiction to grant a decree of divorce in the case of a Mahomedan marriage. I am not disposed to go further than the authorities have gone. It was the opinion of Lord Brougham in *Warrender* v. *Warrender* (1) that it would be absurd to suppose that if there were a country in which marriage could be dissolved without any judicial proceedings at all, merely by the parties agreeing in pais to separate, every other country ought to sanction a separation had in pais there and uphold a second marriage contracted after such separation. It would be still more absurd if the separation could be effected not by the consent of both parties but by the will of one. It is true that this was a mere dictum, but in my opinion it was thoroughly sound.

In my opinion we ought to hold that the first marriage was not dissolved, and therefore there was an impediment to the second marriage which justified the registrar in refusing to issue a certificate or licence. The application must be dismissed.

Rule discharged.

J. E. A.

The applicant appealed.

Nov. 23. *The Appellant* in person. [The arguments were the same as in the Court below. *Bater* v. *Bater* (2) was also cited.]

Sir G. Cave, S.-G., and *G. A. H. Branson*, for the respondent, were not called upon to argue.

SWINFEN EADY L.J. This is an appeal by Dr. Mir-Anwaruddin from an order of the Divisional Court of the King's Bench Division discharging a rule that had been obtained for a mandamus to the

(1) 2 Cl. & F. 488, 534. (2) [1906] P. 209.

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superintendent registrar of Hammersmith commanding him to show cause why he should not issue, pursuant to the statutes in that behalf, to the appellant a certificate in the form or to the effect of the certificate set forth in the Sched. B annexed to the Marriage and Registration Act, 1856, and at the same time a licence authorizing the appellant to marry Miss Vyolet Louise Ling. The appellant obtained a rule nisi from the Court, but it was discharged after argument, and it is from the decision discharging that rule that the appellant now appeals.

It is provided by the statute 19 & 20 Vict. c. 119, s. 9, that "every superintendent registrar receiving notice of an intended marriage to be solemnized by licence as aforesaid shall, after the expiration of one whole day next after the day of the entry of such notice in his 'marriage notice book,' issue under his hand, upon the request of the party giving such notice, a certificate in the form or to the effect of the certificate set forth in the said Schedule (B) to this Act annexed, and also a licence to marry, provided that in the meantime no lawful impediment to the issuing of such certificate be shown to the satisfaction of the same superintendent registrar." An application was made by the appellant for that certificate and licence, which is dated August 12, 1916, and in it he gives his name and the lady's name, Vyolet Louise Ling, and in the column headed "Condition" he describes his condition: "Formerly the husband of Ruby Pauline Hudd from whom he is divorced according to Mohammedan law." Then the lady is described as a spinster; he is twenty-seven and she is nineteen years of age, both residing at 85, Sinclair Road, West Kensington. Then the form says: "And I hereby solemnly declare that I believe there is no impediment of kindred or alliance or other lawful hindrance to the said marriage." That application having been made to the registrar, the objection was raised that the appellant, the intended husband, was already married. Of course, if that were so, it could not be disputed that the registrar was not bound to give a certificate and licence, because there is the proviso that in the meantime there is no lawful impediment shown to the issuing of that certificate.

The question raised upon this appeal is whether the appellant is now a married man and, as such, precluded from obtaining a licence and certificate to take another wife in England, his first wife being

still living and the bonds of matrimony not being dissolved. The appellant was born on December 18, 1888, and he is of the Mussulman faith, born in, permanently resident in, and domiciled in India, in the province of Madras. On March 18, 1913, he intermarried with an Englishwoman, Ruby Pauline Hudd. Differences afterwards arose between him and his wife. It is not necessary to go through the various proceedings. The wife left him, refused to live with him; he did obtain by an application to the City Civil Court at Madras a decree of restitution of conjugal rights, whereby the wife was ordered to return to cohabitation within three months. That order she has not paid attention to. Thereupon an application was made by the appellant to the Divorce Division of the High Court of Justice in England; he presented a petition for divorce on the ground of his wife's alleged adultery. The petition came on for hearing before Bargrave Deane J., the matter being adjourned to be dealt with by the judge in open Court after it had been before the registrar; and ultimately Bargrave Deane J. dismissed the petition, holding that if there was a subsisting marriage the Divorce Division of the High Court had no jurisdiction to dissolve it; the learned judge's order was founded upon the fact that the domicil of the appellant was in India. The appellant then points out that there is no jurisdiction in the High Court in India to dissolve the marriage because under the circumstances the jurisdiction of that Court does not extend to his case; that, having regard to the provisions of the Indian Divorce Act, he is unable to obtain a divorce in India. The Act is Act No. IV. of 1869, and it recites that it is expedient to amend the law relating to divorced persons professing the Christian religion and to confer upon certain Courts jurisdiction in matters matrimonial. Then it says in s. 2: "This Act shall extend to the whole of British India"; then, "nothing hereinafter contained shall authorize any Court to grant any relief under this Act except in cases where the petitioner professes the Christian religion and resides in India at the time of presenting the petition, or to make decree of dissolution of marriage except in the following cases: (1.) Where the marriage shall have been solemnized in India, or (2.) where the offence complained of shall have been committed in India, or (3.) where the husband has, since the solemnization of the marriage, changed his profession of Christianity for the profession

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of some other form of religion." The appellant says there is a limit, therefore, to the jurisdiction of the Indian Courts, and as I am a Mussulman professing the religion of Islam I do not come within the provisions of the Indian Divorce Act. He says, My position is this: that in England, as I am not domiciled there, there is no jurisdiction in the Courts to dissolve my marriage; in India, where I am domiciled, the jurisdiction conferred on the Indian Courts does not extend to my case. That being so, on August 27, 1915, by a writing under his hand called Talaknama, he purported to divorce his wife. The writing was signed by him in the presence of two witnesses, and it recites: "Whereas Ruby Pauline Mir-Anwaruddin, my lawfully wedded wife, (the second daughter of Charles Sterling Hudd and Florence Fanny Hudd, of . . . . has of her free will and accord left my protection and lived separately and apart from me since May 3, 1913: And whereas the said Ruby Pauline Mir-Anwaruddin has deliberately treated with contempt the decree and order of His Majesty's City Civil Judge at Madras, in the Empire of India, dated December 15, 1913, which commanded her to rejoin me and live with me at Madras: And whereas the Courts of His Majesty in England have no jurisdiction to try a suit for dissolution of my marriage owing to my being domiciled in the Empire of India, and the Courts of His Majesty in the Empire of India have no jurisdiction to dissolve a marriage between parties who do not profess the religion of Christ, I have no alternative but to exercise my privilege as a Mohammedan, which I hereby do, by pronouncing Talak in the name of God and His Holy Prophet Mohammed (on whom be peace). Witness my hand this 27th day of August, 1915." That is the writing of divorce, and the appellant has argued before us that, being a Mahomedan, and being entitled according to the law of his religion and of his domicil to divorce a wife without giving any reason for it, he has exercised that right; he says that the marriage is thereby dissolved between him and Ruby Pauline Hudd, and that his status is now not that of a married man, but that he is an unmarried man capable of contracting according to English law another marriage.

No question arises on this appeal with regard to the rights which a Mahomedan has of marrying several wives. A Mahomedan is entitled, according to the appellant's evidence, to have four wives,

and no question arises as to what his position in India would be with regard to taking further wives; whatever rights he may have in that respect do not come before us here, and they call for no comment; they are not in question.

What the appellant has done is this: he has contracted in England with an Englishwoman, according to the forms prescribed by law, an English marriage. In doing so the obvious intention of both parties to the contract was to confer upon the lady whom he took to wife the status and position of a married woman. Such a position, the position of a wife, as known to the English law, is the voluntary union of one man with one woman to the exclusion of all others. That has been frequently said to be a Christian marriage. A Mahomedan marriage, using the term "marriage," is something quite different. Ladies taken to wife in the Mahomedan sense do not acquire that status and that position which the sole wife allowed in Christian countries is given and enjoys. The difference between these two positions has been often pointed out. So far back as 1835 Lord Brougham in *Warrender* v. *Warrender* (1) expressed himself thus: "Marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe, that we regard it as a wholly different thing, a different status, from Turkish or other marriages among infidel nations,"—infidel nations there is as distinguished from Christian nations,—"because we clearly never should recognise the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate. This cannot be put upon any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding Christian marriage to be the same everywhere." In 1866 *Hyde* v. *Hyde* (2) came before the Judge Ordinary (Lord Penzance), and there he dealt with the same subject. He said: "Marriage has been well said to be something more than a contract, either religious or civil—to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of 'husband' and 'wife' is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety

(1) 2 Cl. & F. 488, 532. (2) L. R. 1 P. & M. 130, 133.

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of legal incidents during the lives of the parties, and induce definite rights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others. There are no doubt countries peopled by a large section of the human race in which men and women do not live or cohabit together upon these terms—countries in which this Institution and status are not known. In such parts the men take to themselves several women, whom they jealously guard from the rest of the world, and whose number is limited only by considerations of material means. But the status of these women in no way resembles that of the Christian 'wife.'" Pausing there, I should say that I have already referred to the fact that according to the Mahomedan faith the number is not unlimited; it is limited to four; so with regard to a Mahomedan it must be taken with that qualification. "In some parts they are slaves, in others perhaps not; in none do they stand, as in Christendom, upon the same level with the man under whose protection they live. There are, no doubt, in these countries laws adapted to this state of things—laws which regulate the duties and define the obligations of men and women standing to each other in these relations. It may be, and probably is, the case that the women there pass by some word or name which corresponds to our word 'wife.' But there is no magic in a name; and if the relation there existing between men and women is not the relation which in Christendom we recognise and intend by the words 'husband' or 'wife,' but another and altogether different relation, the use of a common term to express these two separate relations will not make them one and the same, though it may tend to confuse them to a superficial observer." Then, later still, in *Harvey* v. *Farnie* (1), when it was in the Court of Appeal, Lush L.J. said: "As Mr. Fooks has referred to what is called 'marriage' in a country where polygamy is the law, I must take the opportunity also of

(1) 6 P. D. 35, 53.

saying, in accordance with what has fallen from Cotton L.J., that there is no analogy whatever between the union of a man and a woman in a country where polygamy is allowed, and the union of a man and a woman in a Christian country. Marriage in the contemplation of every Christian community is the union of one man and one woman to the exclusion of all others. No such provision is made, no such relation is created, in a country where polygamy is allowed."

Now under these circumstances the marriage which was celebrated between the appellant and Ruby Hudd on March 18, 1913, has not been dissolved by any Court of competent jurisdiction (the appellant says there is none), and it is not a marriage in the Mahomedan sense which can be dissolved in the Mahomedan manner. No question arises that according to the Mahomedan law if a member of that persuasion has taken several wives (within the limit allowed), and has entered into a union of that kind with those ladies according to his law, he may terminate that union by the writing of divorce and such a union is so terminated. The appellant has adduced evidence to make it clear that the husband has that right without assigning any reason; where to him, and him alone, it seems good to put her away, in those circumstances he can do it; but it is quite impossible to hold that such a writing of divorce could dissolve a marriage contracted here in England with an Englishwoman, although the husband is a Mahomedan. In fact, the case was put in the House of Lords by Lord Brougham in *Warrender* v. *Warrender* (1) in language which I will read. Lord Brougham is pointing out the difference between the nature of the contract which is entered into in a Christian marriage and the jurisdiction of the Courts and their power of dealing with the rights of parties thereto, and he says: "Indeed, another consequence would follow from this doctrine of confounding with the nature of the contract that which is only a matter touching the jurisdiction of the Courts, and their power of dealing with the rights and duties of the parties to it; if there were a country"—and he puts the case which I put during the argument to the appellant—"in which marriage could be dissolved without any judicial proceeding at all, merely by the parties agreeing in pais to separate, every other country ought to

(1) 2 Cl. & F. 488, 534.

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sanction a separation had in pais there, and uphold a second marriage contracted after such a separation. It may safely be asserted, that so absurd a proposition never could for a moment be entertained." That is the proposition which the appellant has sought to make good here, by power in pais, by writing under his hand, and without even the concurrence of the wife, without accord between them, at the mere will of the husband, to put her away, and then say that this English marriage is thereby dissolved. In my opinion it is quite impossible to maintain that argument. The English marriage is still subsisting and there is a lawful impediment to the petitioner taking a second wife, standing the first marriage. I am of opinion that the appeal fails and should be dismissed.

BANKES L.J. I agree. According to the appellant's statement, he on March 18, 1913, contracted a civil marriage with Ruby Pauline Hudd at the superintendent registrar's office at Wandsworth. The first question that has to be decided is, what kind of marriage was that; and it seems to me that that question is answered by a reference to the Act of Parliament under which the marriage took place. It took place under an Act of Parliament which was one of a series which laid down certain regulations, and gave certain facilities, for the contracting of Christian marriages and Christian marriages alone. The distinction between such a marriage and the marriage of a Mahomedan is well indicated by Lord Brougham in the passage which Swinfen Eady L.J. referred to, where he says, referring to a statement that he had made (1), " This cannot be put upon any rational ground, except our holding the infidel marriage to be something different from the Christian " ; and later on he says that the fallacy of the argument to the contrary, in his opinion, is confounding incidents with essence ; and the essence of the two marriages is entirely distinguishable. The essence of the Christian marriage is, if I may adopt the language of Lord Penzance in *Hyde* v. *Hyde* (2), where he says the matrimonial law of this country is adapted to the English marriage and it is wholly inapplicable to polygamy : " I conceive that marriage, as understood in Christendom may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others." Now, having

(1) 2 Cl. & F. 488, 532. (2) L. R. 1 P. & M. 130, 133.

contracted that particular form of marriage, the appellant on August 27, 1915, claimed to dissolve it by a writing of divorce, and he claimed to dissolve it because he was a Mussulman, and he claimed that upon his marriage his wife acquired his status, and that therefore his law as a Mussulman applied to her, and that law included his right to put her away by a writing of divorce. Now, of course, that law, if it exists, must be proved by evidence, and the evidence which has been brought forward on affidavit, in my opinion, indicates something very different. All that is said is that according to the Mussulman law administered in British Courts in India a Mussulman has a right to dissolve his own marriage either by word of mouth or in writing; but no reference is made to what kind of marriage—whether it is his own Mussulman marriage to which the Mussulman law applies; and when the appellant was asked whether he could produce a single instance of this law having been applied to a Christian marriage he replied in the negative. Therefore it is, in my opinion, sufficient to dispose of this appeal to say that there is no evidence of any personal law applicable to the appellant which gives him the right to put away a wife whom he has married by a Christian marriage by a writing of divorce. But I am prepared to go further if the marriage of 1913 is to be treated as a Christian marriage and adopt the language of Lord Brougham, which has already been referred to, in *Warrender* v. *Warrender* (1), where he says that the suggestion that the marriage could be dissolved without any judicial proceedings at all, merely by the parties agreeing in pais to separate, would be absurd. What Lord Gorell, the President as he then was, in *Chetti* v. *Chetti* (2), says is very much to the same effect: "Ought a foreigner, domiciled abroad, who comes to this country and here marries in due form according to English law another person domiciled in England, to be allowed to assert that he carries about with him, while here, the burden of an incapacity imposed by the laws of the foreign domicil to do that which he has done voluntarily and in due form according to the laws of England, or to repudiate his marriage on the ground that he is incapable of doing what he has done, and ought our Courts to support such an assertion and repudiation, with the consequent effects on the position of the

(1) 2 Cl. & F. 488, 534. (2) [1909] P. 87.

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wife and legitimacy of the child ? To my mind the answer should be 'No.'" The appellant suggests that the marriage of 1913 was a Mahomedan marriage, and, though he may have been bound by it at the time, he was entitled to put it aside by his writing of divorce. What is it he is coming to ask for now ? It is exactly the same as he applied for in 1913. In other words, he is making an application for a Mahomedan marriage; this the registrar was in my opinion quite right to refuse, because he exercises his authority under a statute which gives him authority to deal with persons and to assent to the request of persons who are asking for Christian marriages and for no other form of marriage. Therefore, whichever way it is looked at, it is clear to me that the appellant fails and that the superintendent registrar was perfectly right in holding that there was, in the language of the section, a lawful impediment to the marriage which the appellant was anxious to contract.

A. T. LAWRENCE J. I am of the same opinion. The short point is whether this Court should grant a mandamus compelling the superintendent registrar to issue this certificate under the Marriages Act. Now it appears that when that certificate was applied for he was also quite properly informed of the previous marriage which had taken place in the year 1913. That marriage had been validly solemnized in the registry office in that year, and the only ground for saying that a new certificate for another marriage could be granted was that the appellant had, by his own writing, purported to dissolve that marriage. I think that that is an even stronger case than the one mentioned by Lord Brougham as absurd in *Warrender* v. *Warrender*. (1) Here, it is not suggested that there was any consent on the part of the woman, but it is the man seeking to be, or purporting to be, a judge in his own cause, and dissolving his marriage without any communication with the woman, or any consent on her part, affecting her rights as well as his own. I think it is contrary to natural justice that a man should be judge in his own cause and determine his marriage at his own will and pleasure, and that the registrar was perfectly right in refusing to grant another

(1) 2 Cl. & F. 488, 534.

certificate while that marriage was a subsisting marriage and only purported to be affected by this writing of divorcement.

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Appeal dismissed.

Solicitor for respondent : *Solicitor to the Treasury.*

W. J. B.

[IN THE COURT OF APPEAL.]

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Master and Servant—Contract to pay Benefit to Workman in Master's Employment at Certain Date—Workman at that Date absent from Work and receiving Compensation for Injury—Termination of Employment—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58).

The fact that a workman stays away from work and receives compensation from his employers during temporary incapacity for work resulting from injury received by him during the course of his employment does not of itself terminate the employment, even though the contract of employment is merely at will.

Decision of Divisional Court (Lush and Rowlatt JJ.) [1916] 1 K. B. 906 affirmed.

THE male plaintiff in this action was employed as an overlooker in the weaving shed of the defendant company. On February 7, 1914, he met with an accident in the course of his employment, in consequence of which he was unable to work. The defendants admitted liability and paid compensation from the date of the accident until March 13, 1915, except for a short interval during which he attempted to return to work, but was found unable to do full work, and then discontinued his attendance at the works and continued to receive compensation.

On September 4, 1914, after the commencement of the war, the defendants posted in their works the following notice : " During the period of the war it has been decided to pay employees who have been called up or volunteered for service with the Regulars, Territorials, &c., full wages, less Government allowances and thrift

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fund contributions. . . . . Re-engagement after the war is over, or when they are able to re-enter the service of the society is guaranteed." A further notice was added in red ink on September 11, 1914: "Henceforward these conditions will apply only to those employees in the service of the society prior to the declaration of war." It had been agreed that payments under these notices should be paid to the wives of employees.

On March 13, 1915, the plaintiff returned to his work at the defendants' weaving shed. On May 17, 1915, he enlisted in the Army.

He and his wife brought this action in the county court for twenty-seven weeks' compensation, on the terms of the notice, amounting to 35*l.* 2*s.*

The defendants admitted that the notices constituted a contract binding on them, but contended that the plaintiff had ceased to be in their employment before the commencement of the war.

The county court judge gave judgment for the plaintiffs, holding that the male plaintiff was continuously in the employment of the defendants from some time before February 7, 1914, until his enlistment.

The defendants appealed to the Divisional Court, and the Court (Lush and Rowlatt JJ.) affirmed the decision of the county court judge. The case is fully reported below. (1)

Barrington-Ward (*Gordon Hewart, K.C.*, with him), for the appellants, and *Cyril Atkinson, K.C.*, and *Acton*, for the respondents, relied on the same arguments and cited the same cases as were used in the Court below.

Cur. adv. vult.

Dec. 15. LORD COZENS-HARDY M.R. This appeal raises a curious question as to the meaning of a badly-drawn contract.

The applicant, a workman in the employment of the defendants, met with an accident in February, 1914. He was away from work for nearly three months and in receipt of compensation under the Workmen's Compensation Act, 1906. He returned to work at the end of April. In May, 1914, he again left work and received com-

(1) [1916] 1 K. B. 906.

pensation under the Workmen's Compensation Act. He was away from work until March 13, 1915, when he was examined and found capable of doing his old work, which he continued to do until May 17, 1915, when he enlisted.

A notice was put up at the works dated September 4, 1914, which is admitted to be a contract, and the plaintiff claims payment under it. [His Lordship read the notice and continued :]

It is said by the employers that the applicant does not come within the terms of the contract, (*a*) because the contract of service was put an end to by the acceptance of compensation ; (*b*) because, according to the true construction of the contract, the words " in the service of the society " are limited to actual service, in the sense of doing work in return for full wages.

In my opinion neither of these points can avail the employers.

It has been long settled that a contract of service is not terminated by incapacity to work by reason of temporary illness, and that on return to work the man can recover his wages during the period of his absence : *Cuckson* v. *Stones*. (1) I think this principle must apply to a case where a workman is receiving compensation under the Workmen's Compensation Act. It was held in a Divisional Court in the case of *Elliott* v. *Liggens* (2) that the service was not ended, although the man could not, while in receipt of compensation, receive wages, and apparently not even wages less the compensation. I feel some difficulty in understanding the ground upon which the latter point was decided, and I desire to keep an open mind if it should hereafter be necessary for this Court to consider it. I think the applicant was in the service of the society on August 4, 1914, and also in May, 1915, when he enlisted.

I am unable to appreciate the argument on the second ground. I cannot insert in the contract the various contingencies which are said to be implied. If the workman had been doing his full work on August 4, and had gone on compensation on August 6 and remained so till January 1, 1915, his absence from August 6 to January 1 would not have taken him out of the contract.

Another point was faintly urged, that the contract of service, which might have been ended by notice, was in fact terminated by what took place in March, 1915.

(1) (1858) 1 E. & E. 248. (2) [1902] 2 K. B. 84.

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The county court judge has found this fact: "Nothing had ever been said or done by either party prior to May 19 to terminate the contract of service. The defendants had recognized that the contract continued." The judges in the Divisional Court took the same view. And I have no hesitation in arriving at the same conclusion.

In my opinion the appeal fails and must be dismissed with costs.

WARRINGTON L.J. The defendants, the Co-operative Wholesale Society, Limited, admit that they have legally bound themselves to pay to such of the employees in their service immediately prior to the declaration of war as have been called up or volunteered for service with the Regulars, Territorials, &c., full wages less Government allowances and thrift fund subscriptions.

The plaintiff on May 17, 1915, voluntarily enlisted in the Army. He was then in the employment of the society, and claimed payment of money due to him under the agreement. The society disputed this claim on the ground that he was not in their service immediately prior to the declaration of war. The county court judge and the Divisional Court have decided in the plaintiff's favour. The defendants appeal. The question is whether upon the true construction of the agreement, in the events which have happened, the plaintiff was an employee in the service of the defendants on August 4, 1914.

For some years prior to the month of February, 1914, he had been in their employment as an overlooker in their weaving sheds at a weekly wage of 2*l.* On February 7, 1914, he sustained an injury by accident arising out of and in the course of his employment. The defendants admitted their liability and paid him 1*l.* a week, being half the amount of his wages, until April 30, 1914. He had then so far recovered that he returned to work, but in a short time found that he was unable to do his work without paid help, which, for reasons not material to be stated, he could not obtain. He discontinued his attendance at the works and was paid compensation as before. During the time he was away his name was kept on the books as an overlooker—his wages were credited to him; they were not paid to him, but were divided amongst the other overlookers. On March 11, 1915, the defendants wrote to the plaintiff's then solicitor a letter containing the following passage: "We are advised

as the result of the medical examination of your client that he is now quite capable of doing his ordinary work and we are therefore instructed to inform you that no payments of compensation will be made to him after Saturday in this week, and that if he will present himself on Monday morning at our clients' mill at Bury his place will be open to him." He went back to work on the Monday and remained at work until he enlisted as already mentioned. The employment was at will. The county court judge has found that nothing was done on either side to determine it.

Was he in the service of the defendants on August 4, 1914? I think he was. It is clear that mere absence from work owing to illness or accident does not determine the contract of service: *Cuckson* v. *Stones* (1); and I am unable to see how a claim to and receipt of compensation under the Act could have that effect. It may well be that, as decided in *Elliott* v. *Liggens* (2), he could not while receiving compensation claim payment also of the wages payable under the contract, but it by no means follows that the relation of master and servant is determined.

It was contended that the benefit of the contract was confined to those who were at the critical time in actual receipt of wages. I can find nothing in the contract to justify this limitation of its scope; on the contrary, the reference to "full" wages seems to me to indicate that the society were contemplating cases in which the employee in question might not at the time of enlistment be receiving his full wages.

That the defendants treated the plaintiff as in their service during the whole of his incapacity is I think clear from the mode in which his case was dealt with in their books and from the terms of the letter of March 11.

I think that, though on August 4, 1914, he was temporarily absent from his work, he was regarded by the defendants, and was in fact, in their service on that day, and accordingly has been properly held entitled to the benefit of the agreement.

In my opinion the appeal should be dismissed.

SCRUTTON L.J. The Co-operative Wholesale Society appeal against a judgment of the Divisional Court affirming a judgment of

(1) 1 E. & E. 248. (2) [1902] 2 K. B. 84.

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Scrutton L.J.

the county court judge at Rochdale in favour of one Warburton for 35*l.* under the following circumstances. [His Lordship stated the facts as above and continued :]

On September 4, 1914, the society put out a notice, which with its important rider of September 11, 1914, is the document to be construed. It reads as follows : [His Lordship read the notice above set out and continued :] It was admitted by the society that the notice created a contract, which saves us the decision of the question whether there was any consideration for the promise to pay those who joined the Army by virtue of any legal obligation not voluntarily incurred.

Under the first clause the plaintiff was certainly "an employee who volunteered for service." The question to be decided is whether under the rider he was an "employee in the service of the society prior"—which I think must mean immediately prior—"to the declaration of war." It was said for the society that he was not, as he was not in work or entitled to wages, but was only receiving compensation for previous injury. It was said for the claimant that his service was not terminated, though temporarily through illness he was unable to work.

Under decided cases a servant incapacitated by illness and in the absence of notice under the contract does not cease to be employed unless the illness is such as seriously to interfere with or frustrate the business purpose of the contract: *Cuckson* v. *Stones* (1); *Story* v. *Fulham Steel Works Co.* (2) But, though still in employment, he is not entitled to full or any wages while receiving sick pay under rules, or compensation under the statute : *Niblett* v. *Midland Ry. Co.* (3); *Elliott* v. *Liggens.* (4) The reason for this latter proposition is based either on an implied contract that a man who is receiving money because he is not able to work should not also claim the full money he would receive were he able to work, or, as in *Elliott* v. *Liggens* (4), on some kind of estoppel, which I do not clearly understand. The result of the cases, however, appears to be very good sense, and I do not think the Court should interfere with them. If this is the law, the county court judge has found as a fact that the employment continued, and was recognized by the society as

(1) 1 E. & E. 248.
(2) (1907) 24 Times L. R. 89.
(3) (1907) 23 Times L. R. 240.
(4) [1902] 2 K. B. 84.

continuing, by keeping the servant's name in their book, though his wages were paid elsewhere, and by giving him no notice to terminate the contract. There was evidence on which the judge could find this, and the Court cannot interfere with his finding. But, though in the society's employment, Warburton could not recover wages, as he was receiving compensation.

Warburton was therefore in the employment of the society immediately prior to the declaration of war. We were invited to exclude him from the notice by holding that it was an implied term that he should do his full work at full wages from the declaration of war till his joining the Army. It is enough to say that the notice contains no such words, and I see no reason to help out a clumsily drafted notice by implying the terms which the society's advisers, if they had thought about the matter a little more carefully, might perhaps have inserted. It is only a possibility, for I see no reason why a month's illness, or a month's compensation for injury, in the record of a man who was serving the society before the war and enlisted from their service should deprive him of the benefit which they offered to induce their servants to enlist. The appeal must be dismissed with costs.

Solicitors for appellants: *Davenport, Cunliffe & Blake, for Tatham, Worthington & Co., Manchester.*

Solicitors for respondents: *Torr & Co., for C. B. Hudson, Rochdale.*

J. R. B.

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Nov. 22, 23.

TURNER *v.* COATES.

Negligence—Unbroken Colt loose on Highway at Night—Injury to Person using Highway.

A young unbroken colt belonging to the defendant, a farmer, was being taken along a highway on a dark night. It was allowed to go loose behind a mare which was being led and in front of a trap driven by the defendant. The plaintiff, who was riding a bicycle, was coming from the opposite direction when the colt, being startled by the light on the bicycle, suddenly ran across the road and collided with and injured the plaintiff. No warning was given by the defendant to the plaintiff of the presence of the colt. In an action to recover damages the county court judge gave judgment for the plaintiff. He found that it was well known, especially to a farmer, that a young unbroken colt when loose on the highway is apt, when startled, to rush about and to kick, and that there is grave risk of danger to the public in allowing such a colt to go loose on the highway in the dark; and he accordingly held that the defendant was guilty of negligence in allowing the colt to be on the highway in the dark without being under proper control and in failing to give warning to the plaintiff of the presence of the colt:—

Held, that the county court judge was right in so holding.

Appeal from the Leominster County Court.

The plaintiff, a nurse, claimed damages for injuries sustained by her owing, as she alleged, to the defendant's negligence in the following circumstances:—About 7 o'clock P.M. on January 24, 1916, she was cycling on the highway near Tenbury. It was a very dark night. Her bicycle lamp was alight, and she was on the proper side of the road. Seeing something approaching, she kept still nearer to her near side, and shortly afterwards she met a lad coming towards her leading a mare by a halter. She passed him and had come abreast of a trap driven by the defendant when a colt belonging to the defendant, having been startled by the bicycle light, ran across the road and collided with and injured her. It appeared that the defendant, a farmer, was on the evening in question taking the colt, which was about sixteen or eighteen months old and was unbroken, to Newnham, some little distance from Tenbury. He considered the most suitable way of doing this was to get it to follow the mare with which it had been for about twelve months, and accordingly he told the lad to go first and to walk on the near

side of the road and on the near side of the mare, leading her by a halter. The lad did so, while the defendant in his trap followed up behind, the colt going loose between the mare in front and the trap behind. The colt was under no sort of control.

At the trial a witness called by the plaintiff said that a young colt, whether broken or not, should be led by a halter, and not allowed to run loose on the highway, as it was well known that such an animal would rush anywhere and was apt to kick. A veterinary surgeon called by the defendant said it was not customary to halter an unbroken colt, but that there was danger to the public in allowing the colt to go along the highway in the dark without being under proper control; it was customary for owners of colts to allow this to be done, although, he added, he would not adhere to the custom himself.

The county court judge was satisfied that it was well known, especially to a farmer, that a young unbroken colt, when loose on the highway, is apt, when startled, to rush anywhere and to kick, even though it is following a mare to which it may have been long accustomed, and that there was grave risk of danger to the public in allowing such a colt to go loose on the highway in the dark. For these reasons, and especially having regard to the fact that the night was pitch dark, the judge found that the defendant was negligent in allowing the colt to be on the highway without being under proper control when he knew, or ought to have known, that it would be likely, if startled, to rush about the road, or to kick any object near by, and in giving no warning to the plaintiff of the presence of the colt; he further found that the defendant's negligence caused the accident. He accordingly gave judgment for the plaintiff, assessing the damages at 29*l.* 9*s.* 6*d.* The defendant appealed.

Arthur Brooke, for the defendant. There is no duty on the part of the owner of a domestic animal to prevent it straying on a highway: per Buckley L.J. in *Ellis* v. *Banyard.* (1) Therefore, in the absence of evidence of knowledge on the part of the defendant that the colt had a mischievous or dangerous propensity to run into or kick persons, he was not guilty of negligence in allowing

(1) (1911) 106 L. T. 51, 53.

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the colt to go loose on the highway: *Mason* v. *Keeling* (1); *Cox* v. *Burbidge* (2); *Bradley* v. *Wallaces* (3); *Heath's Garage* v. *Hodges*. (4) No distinction can be drawn in this respect between the different kinds of domestic animals: per Neville J. in *Heath's Garage* v. *Hodges*. (5)

[BAILHACHE J. In *Cox* v. *Burbidge*, Erle C.J. said (6): "I take the well-known distinction to apply here, that the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner knows it." In order to succeed you have to satisfy us that the damage that occurred was not likely to be done by the colt in the circumstances. It looks like a question of fact for the county court judge.]

In *Heath's Garage* v. *Hodges* (4) there was a finding by the county court judge that sheep have a natural tendency when untended to run across or otherwise endanger vehicles on the highway, but, notwithstanding that finding, the Divisional Court and the Court of Appeal held that the owner of a sheep which ran into a motor car and caused it to be overturned was not liable for the damage done. Experience shows that horses do not kick or attack mankind. As was said by Neville J. in *Heath's Garage* v. *Hodges* (5), "the prima facie harmlessness of domestic animals as frequenters of the highway, is, I think, established as a legal doctrine. As Blackburn J. said in *Fletcher* v. *Rylands* (7), 'our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore.'" The evidence that was given as to the tendency of colts as a class of animals to rush about when frightened and kick at anything was therefore irrelevant and inadmissible. To make the defendant liable there must have been evidence to show that to his knowledge the particular colt had a tendency to do what it in fact did. In *Hudson* v. *Roberts* (8), where a bull while being driven along a highway attacked the plaintiff, who was on the road and was wearing a red handkerchief, it was held that there was evidence of scienter because there was evidence that the defendant had

(1) (1700) 1 Ld. Raym. 606.
(2) (1863) 13 C. B. (N.S.) 430.
(3) [1913] 3 K. B. 629.
(4) [1916] 2 K. B. 370.
(5) Ibid. 382.
(6) 13 C. B. (N.S.) 430, 436.
(7) (1866) L. R. 1 Ex. 265, 280.
(8) (1851) 6 Ex. 697.

said after the accident "that the red handkerchief was the cause of it, for he knew that *the* bull would run at anything red," and that, according to another witness, the defendant had said on another occasion that "he knew that *a* bull would run at anything red." If there was any negligence on the part of the defendant the damage was not the natural and probable consequence of such negligence: *Jones* v. *Lee.* (1) [He also cited *Catchpole* v. *Minster* (2), *Smith* v. *Cook* (3), *Osborne* v. *Chocqueel* (4), *Higgins* v. *Searle* (5), and *Clinton* v. *Lyons & Co.* (6)]

Harold Brandon, for the plaintiff. An unbroken colt is not in the category of animals mansuetae naturae, and in the circumstances it was dangerous to allow it to be loose on the highway in the dark. The question was one of fact for the county court judge, and, he having found that the defendant was guilty of negligence and that that negligence caused the accident, this Court cannot interfere.

Arthur Brooke replied.

Hawke, K.C., as amicus curiae, cited *Pinn* v. *Rew.* (7)

LUSH J. stated the facts and continued: With the aid of the evidence that was given, and even without it, I think the county court judge was entitled to come to the conclusion that, having regard to the natural propensity of an unbroken colt, the defendant was guilty of a want of care in sending it on to the highway not under proper control, and, further, that there was negligence on the part of the defendant in failing to give the plaintiff proper warning. Although the cases on this subject raise difficult questions, and although it is not very easy to reconcile them—it is certainly not easy to reconcile the decision in *Heath's Garage* v. *Hodges* (8) with the earlier decision of the Court of Appeal in *Ellis* v. *Banyard* (9)—I think that this case presents no real difficulty. No doubt a person is entitled at common law to drive a flock of sheep along a highway at night without a light; and there is no doubt that the mere fact that an ordinary domestic animal strays from the owner's premises on to the highway does not necessarily

(1) (1911) 106 L. T. 123.
(2) (1913) 109 L. T. 953.
(3) (1875) 1 Q. B. D. 79.
(4) [1896] 2 Q. B. 109.
(5) (1909) 100 L. T. 280.
(6) [1912] 3 K. B. 198.
(7) (1916) 32 Times L. R. 451.
(8) [1916] 2 K. B. 370.
(9) 106 L. T. 51, 53.

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make the owner liable because some injury is done by it while on the highway. In this case we are dealing with an animal of a particular class with particular propensities—an animal as to which the witnesses say that it was not only likely to do harm to passers-by, but that it could hardly fail to do harm. It is said that that evidence should not have been admitted. I do not agree. I see no objection to evidence being given that under certain circumstances a particular animal exhibits habits which are dangerous to mankind. But even without that evidence I should have thought that an unbroken colt would be likely to do what it did in this case, especially in the dark. Assuming that to be its natural propensity under these circumstances, was there any negligence on the part of the defendant? Is there any duty to take reasonable care in turning an animal like this on to the highway? In my opinion there clearly is a duty on the part of a person who owns an animal which under particular circumstances is likely to do harm to take reasonable precautions to prevent it doing harm. Lord Cozens-Hardy M.R. said so, by implication at any rate, in *Heath's Garage* v. *Hodges* (1), which was a case not of a man turning an animal on to a highway but of a farmer negligently allowing gaps in his fence through which his sheep strayed on to the highway and did damage to a motor car. The Master of the Rolls said this: "I am prepared to hold that in ordinary circumstances, in an ordinary highway, it is no breach of duty not to prevent harmless animals like sheep from straying on to the highway, and that it makes no difference whether the action is sought to be based on negligence or on a nuisance to the highway. An animal like a sheep, by nature harmless, cannot fairly be regarded as likely to collide with a motor car, and the owner of the sheep cannot be held liable on that footing." The Master of the Rolls implies, therefore, that if an animal, having regard to its natural propensities under such circumstances as those with which we are dealing, is likely to come into collision with a person on a bicycle or with a motor car, what he was saying will not apply. In this case, as I have already said, this colt was likely, on a dark night at all events, if not under proper control, to do exactly what it in fact did. Therefore, without taking reasonable care, the defendant turned on to the highway

(1) [1916] 2 K. B. 370, 376.

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an animal likely to cause damage, not by doing something mischievous, but by doing exactly what under the circumstances this colt was likely to do. There was negligence on the part of the defendant, and the damage flowed immediately from that negligence. I think the county court judge was therefore right and that the appeal fails.

The case of *Pinn* v. *Rew* (1), to which our attention has been called by Mr. Hawke, seems to be in accordance with the view I have expressed.

BAILHACHE J. I am of the same opinion. The colt did exactly the damage which the owner must have anticipated it would do if the circumstances arose which in fact arose in this case. The colt, not led by a halter, and not secured in any way, was being driven along the highway. In order to induce it to go quietly an old mare with which it had been brought up was being led in front and the natural tendency of the colt was to follow the mare. The defendant was behind in a trap, the reason no doubt being that if the colt was startled and darted back it could be headed back. It was to be anticipated that people with lights might come along the highway, as the plaintiff did. It is common knowledge—and it was proved, if it was necessary to be proved—that one thing more than another that is likely to frighten an unbroken colt is an unexplained light. The light did in fact frighten the colt, which turned round and, being headed back by the defendant, rushed about in the road and ran into and injured the plaintiff. Apart from authority, it seems to me to be impossible to hold that in those circumstances there was no negligence on the part of the defendant. I attach a good deal of importance to the fact that it was dark at the time. In the dark precautions have to be taken in connection with the driving of animals along a highway different from those that have to be taken in the daytime. In the daytime people can see what is in the road and can take care; in the dark precautions cannot be taken by them unless there is warning. In this case no warning was given to the plaintiff. The test to be applied in all these cases is that which was laid down by Erle C.J. in *Cox* v. *Burbidge* (2): "I take the well-known distinction to

(1) 32 Times L. R. 451. (2) 13 C. B. (N.S.) 430, 436.

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apply here, that the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner knows it." Applying that test to the present case, it appears to me that this colt acted in precisely the way such a colt ought to have been expected to act under the circumstances, and did precisely the damage which under the circumstances it ought to have been anticipated it would do. In *Hadwell* v. *Righton* (1) Bray J. said: "In the absence of anticipated danger, there is no room for the suggestion of negligence." If that is the test applicable, I ask myself if in this case there ought to have been an anticipation of danger, and to my mind that question can only be answered in one way, in the affirmative. Given the circumstances that arose in this case, danger ought to have been anticipated. There are other ways of getting a colt along a highway at night than that adopted by the defendant; the proper way is to lead it by a halter.

It is impossible to say that the county court judge was wrong in law in holding that there was negligence in this case, and, once that is arrived at, the question becomes one of fact, and upon a question of fact there is no appeal. On that ground alone the county court judge's decision must be upheld, but my own view is that he was right.

Appeal dismissed.

Solicitors for defendant (appellant): *Andrews, Ogilvie & Fisher, for W. P. Levick, Leominster.*

Solicitors for plaintiff (respondent): *Metcalfe & Sharpe, for T. A. Matthews, Hereford.*

(1) [1907] 2 K. B. 345, 349.

J. S. H.

WAYMAN *v.* PERSEVERANCE LODGE OF THE CAMBRIDGESHIRE ORDER OF UNITED BRETHREN FRIENDLY SOCIETY.

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Nov. 24, 30.

Friendly Society—Jurisdiction of Committee of Management—Dispute between Member and Society—Expulsion—Friendly Societies Act, 1896 (59 & 60 *Vict. c.* 25), *s.* 68—*Friendly Societies Act*, 1908 (8 *Edw.* 7, *c.* 32), *s.* 6.

Sect. 68 of the Friendly Societies Act, 1896, as amended by s. 6 of the Friendly Societies Act, 1908, provides that every dispute between a member of a friendly society and the society, including any dispute arising on the question whether a member or person aggrieved is entitled to be or to continue to be a member, or to be reinstated as a member, shall be decided in manner directed by the rules of the society, and the decision so given shall be binding and conclusive on all parties without appeal.

While the appellant, who had been for many years the secretary of the respondent society, was away on his military duties a complaint was made against him of having misapplied the society's funds. He denied the allegation, and some correspondence passed between him and his successor in the secretaryship on the subject. Some months later, without giving him any notice of an intention to hold an inquiry, without formulating any charge against him, and without hearing him, the committee of management of the society passed a resolution that the appellant be expelled from the society under rule 3, sub-rule 2, of the rules, which provided that "any officer misapplying the funds shall repay the same and be expelled without prejudice to his liability to prosecution for such misapplication." The rules of the society provided for the decision of disputes by arbitration. The appellant took proceedings against the respondents in the county court for a declaration that the resolution was ultra vires and void and that he was still a member of the society, and for an injunction and damages. The respondents contended that the Court had no jurisdiction to try the action by reason of s. 68 of the Friendly Societies Act, 1896, and s. 6 of the Friendly Societies Act, 1908. The county court judge made a declaration and granted the injunction asked for:—

Held, that if the committee of management in passing the resolution expelling the appellant adjudicated on the question they were guilty of misconduct, and that if they did not adjudicate in the proper sense they acted in direct opposition to the rules which required that the dispute should be left to arbitration, and that in

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either view therefore the county court judge had jurisdiction to declare the resolution to be a nullity.

Andrews v. *Mitchell* [1905] A. C. 78 applied.

APPEAL by Wayman from an order of Ridley J. at chambers.

The appellant, who had been for many years the secretary of the respondent society, was called up as a reservist early in 1915, and while he was away on his military duties in June, 1915, a complaint was made against him of having misapplied the society's funds. He denied the allegation, and a correspondence passed between him and his successor in the secretaryship on the subject. In December, 1915, without giving him any notice of an intention to hold an inquiry, without formulating any charge against him, and without hearing him, the committee of management of the society passed a resolution that he be expelled from the society under rule 3, sub-rule 2, of its rules, and a written intimation to this effect was sent to him dated December 27, 1915.

Rule 3, sub-rule 2, was as follows: "All monies received on account of entrance fees, subscriptions, donations, fines and interest on capital, shall be applied in carrying out the objects of this society according to the rules thereof. Any officer misapplying the funds shall repay the same and be expelled, without prejudice to his liability to prosecution for such misapplication."

The respondents' rules also included the following:—

Rule 11: "(1.) Should any member be convicted of felony or be guilty of disreputable conduct, he, upon proof of the same, and on the finding of a majority of the committee of management, shall be expelled the society, and shall thereupon forfeit all monies which he may have paid, and all the rights, privileges, and benefits which as a member he was entitled to, provided always he shall be at liberty to have the question of his expulsion decided as a dispute within the meaning of the rule on disputes.

"(2.) Any member who, in the opinion of the committee of management, is guilty of acting fraudulently, either as to the funds of the society, or as to the contributions and benefits of the members, shall be expelled without prejudice to any legal proceedings that may be taken."

Rule 23: "(1.) If any dispute shall arise between any member or past member, or person claiming through, under, or on account

of any member or past member, or under the rules of the society, and the society, or the trustees, treasurer, and other officers of the society, or the committee thereof, it shall be referred to arbitration.

"(2.) There shall be five arbitrators, none of them being directly or indirectly beneficially interested in the funds of the society, and in each case of dispute the names of the arbitrators shall be written on pieces of paper and placed in a box or glass, and the three whose names are first drawn out by the complaining party, or by someone appointed by him, shall be the arbitrators to decide the matter in difference.

"(3.) In case of a vacancy or vacancies, another or other arbitrators shall be elected at a general meeting. The decision of such arbitrators shall be binding on both parties."

The appellant took proceedings against the respondents in the county court of Ely for a declaration that the resolution was ultra vires and void and that he was still a member of the society, and for an injunction and damages. The respondents gave notice of a statutory defence that they would object that the Court had no jurisdiction to try the action, and that they would rely on s. 68 of the Friendly Societies Act, 1896 (1), as amended by s. 6 of the Friendly Societies Act, 1908. (2)

At the hearing in the county court the respondents' counsel objected to the jurisdiction on the ground that the dispute, the subject of the action, was one which must be referred under the

(1) Friendly Societies Act, 1896, s. 68, sub-s. 1: "Every dispute between a member . . . . or under the rules of a registered society or branch, and the society or branch . . . . shall be decided in manner directed by the rules of the society or branch, and the decision so given shall be binding and conclusive on all parties without appeal, and shall not be removable into any Court of law or restrainable by injunction; and application for the enforcement thereof may be made to the county court."

(2) Friendly Societies Act, 1908, s. 6, amends s. 68 of the Act of 1896 by adding the following sub-section: "In this section the expression 'dispute' includes any dispute arising on the question whether a member or person aggrieved is entitled to be or to continue to be a member or to be reinstated as a member, but, save as aforesaid, in the case of a person who has ceased to be a member, does not include any dispute other than a dispute on a question between him and the society or branch or an officer thereof which arose whilst he was a member, or arises out of his previous relation as a member to that society or branch."

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statute and rules, and that the question was one solely of law. The judge overruled the objection, whereupon the respondents' counsel retired and took no further part in the hearing. The judge, proceeding with the action, heard evidence, and in the result held that the appellant had not been guilty of misapplying the funds; that the respondents had adjudicated upon the question instead of referring the dispute to arbitration, and that in so adjudicating without hearing the appellant, or giving him any notice to attend, they had been guilty of "misconduct," and he accordingly made the declaration and granted the injunction claimed and awarded 2*l.* 2*s.* damages and costs. The respondents applied in chambers for a writ of prohibition, and Ridley J. ordered the writ to issue, and from that order this appeal was brought.

Rigby Swift, *K.C.*, and *Kyffin*, for the appellant. A society cannot expel a member without formulating a charge against him and hearing him on that charge: *Bagg's Case* (1); *Rex* v. *Cambridge University* (2); *Dean* v. *Bennett*. (3) The resolution purporting to expel the appellant was therefore a nullity, as no charge was formulated against him by the committee of management, and he was given no opportunity of being heard; and accordingly the county court judge had jurisdiction to make the declaration he did. It is said for the respondents that this is a matter which must go to arbitration under the rules as required by the provisions of the Friendly Societies Acts. This contention is not well founded. In *Andrews* v. *Mitchell* (4) it was held that where a member of a friendly society was expelled on a charge on which he had not been heard the Court had jurisdiction to declare the resolution of the society to be null and void on the ground that there had been misconduct on the part of the society in disregarding the fundamental principles of justice. That decision is not affected by s. 6 of the Friendly Societies Act, 1908: see *Catt* v. *Wood* (5) and observation of Lord Loreburn L.C. (6) [*Palliser* v. *Dale* (7) was also referred to.]

[LUSH J. Subject to what may be said on behalf of the respondents, *Andrews* v. *Mitchell* (4) seems to be conclusive upon the point.]

(1) (1615) 11 Rep. 99a.
(2) (1723) 1 Str. 557.
(3) (1870) L. R. 6 Ch. 489.
(4) [1905] A. C. 78.
(5) [1910] A. C. 404.
(6) Ibid. 406.
(7) [1897] 1 Q. B. 257.

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Hawke, K.C., and *St. John Raikes*, for the respondents. Where an arbitration is held under a society's rules, and a member is expelled without being given an opportunity of being heard, that is misconduct on the part of the arbitrators and the Court will set aside their decision. That is what occurred in *Andrews* v. *Mitchell* (1), but is not what happened here. In *Andrews* v. *Mitchell* (1) the tribunal which should have tried the question in dispute acted improperly; here there has been no trial of the question. The committee of management gave the appellant notice that he was no longer a member, just as a master might give a servant notice, but the appellant disputed that notice, and that is a dispute which by s. 6 of the Act of 1908 must be settled by arbitration under the society's rules. If when that dispute comes before them the arbitrators act improperly, the principle of *Andrews* v. *Mitchell* (1) will apply.

Rigby Swift, K.C., in reply. There is nothing to show that the committee of management did not discharge the same functions as the arbitration committee in *Andrews* v. *Mitchell*. (1)

Cur. adv. vult.

Nov. 30. LUSH J. read his judgment, which, after stating the facts set out above, continued as follows: The question that we have to decide is whether the learned county court judge had jurisdiction to entertain the claim, which was for a declaration that the resolution was ultra vires and void.

The appellant relied mainly on the decision of the House of Lords in *Andrews* v. *Mitchell* (1) and a dictum of Lord Loreburn L.C. in *Catt* v. *Wood*. (2) In the former case it was held that, notwithstanding the enactment that disputes must be referred to arbitration and that the award shall be final and binding on the parties, an action may be brought in the county court by a member of a friendly society who has been expelled by a resolution of the arbitration committee if the rules have not been observed, and if the fundamental principles of justice have been disregarded. In that case no notice of the charge on which he was expelled had been given to the member as required by the rules, and the member had

(1) [1905] A. C. 78. (2) [1910] A. C. 404, 406.

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not been heard on the question whether he had committed the offence. The only importance of *Catt* v. *Wood* (1) is that Lord Loreburn L.C., while holding that the dispute there was one that must be referred to arbitration, recognized the principle acted on in *Andrews* v. *Mitchell* (2), namely, that the Court could interfere if the arbitration committee was guilty of the "technical" misconduct which was established in that case. The amending section of the Act of 1908 was called to their Lordships' attention, and was not regarded as in any way affecting that principle.

Now, does the same principle apply to the resolution which was passed by the management committee in this case? It is said for the appellant that it does, because they have adjudicated on the dispute, and they have done so in defiance of the rules which required the dispute to be referred to arbitration, and they have, as the arbitration committee had done in *Andrews* v. *Mitchell* (2), disregarded the fundamental principles of justice. It is said for the respondents that it does not, because there has been no adjudication. The management committee, it is contended, have done no more than a master could have done in discharging a servant for misconduct—namely, they asserted their view and expelled the member on the strength of it. That raises a dispute, it is said, which the appellant must refer to the arbitrators. He cannot apply to the Court for relief.

Now, that there was a dispute at the time the resolution was passed cannot be doubted. It had been the subject of a correspondence, and a complaint had been made which had been repudiated. I have come to the conclusion that the county court judge had jurisdiction to entertain the claim for the following reasons:

The rules as to expulsion for misconduct are difficult to interpret and seem difficult to reconcile. Rule 3, sub-rule 2, on which the respondents acted, only refers to an officer, not "any member," misapplying the funds, and contains no reference to the committee or body who are to determine whether there has been a misapplication. The reference to "officer" and the omission to mention members becomes possibly significant when one notices that the rule with reference to the settlement of disputes speaks of disputes between members and the society, or between members and

(1) [1910] A. C. 404, 406. (2) [1905] A. C. 78.

the officers of the society, and is silent as to disputes between officers and the society. Turning to rule 11, "Expelling Members," sub-rule 1 says: "Should any member be convicted of felony or be guilty of disreputable conduct, he, upon proof of the same, and on the finding of a majority of the committee of management, shall be expelled the society, and shall thereupon forfeit all monies which he may have paid, and all the rights, privileges, and benefits which as a member he was entitled to, provided always he shall be at liberty to have the question of his expulsion decided within the meaning of the rule on disputes." Sub-rule 2: "Any member who, in the opinion of the committee of management, is guilty of acting fraudulently, either as to the funds of the society, or as to the contributions and benefits of the members, shall be expelled without prejudice to any legal proceedings that may be taken." Sub-rule 1 appears to provide for an adjudication by the management committee on the question whether there has been a conviction, or on the question whether the member has been guilty of disreputable conduct, subject to this, that the member may have an adjudication by the arbitrators in lieu of the committee if he demands it. Sub-rule 2 appears to give the management committee power to adjudicate upon the question whether a member is guilty of acting fraudulently as to the funds of the society without any express provision in that part of the rule as to the member having the right to have the dispute referred to arbitration. Rule 3, sub-rule 2, therefore (which must refer to and include charges of fraudulent misapplication of the funds, as it speaks of prosecutions) refers to misapplication of the funds by an *officer*, and does not in terms say that the management committee may act upon their opinions and expel. Rule 11, sub-rule 2, does refer to misapplication by a *member*, and does in terms say that the committee shall expel if in their opinion there has been fraudulent misapplication.

In this state of things it is not, I think, clear whether an officer of the society who is charged with misapplication and condemned without notice and without a hearing is bound to go to arbitration at all, nor is it clear whether, as the appellant has ceased to be an officer, rule 3, sub-rule 2, under which he was expelled, applied to him. But, assuming that these difficulties are out of the way, the questions arise (1.) whether when the society passed the resolu-

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tion expelling the appellant as a member on the ground that he had misapplied the funds they acted judicially and adjudicated on the question, and (2.) whether, if they did not, the appellant, the expelled member, if he had no notice of any inquiry or of any reference to arbitration, was entitled to apply to the Court to declare the resolution a nullity. If (1.) is answered in the affirmative —that is, if the committee acted judicially, as in my opinion they did—I think there is no doubt that the county court judge had jurisdiction. There has been the same kind of misconduct as there was in *Andrews* v. *Mitchell* (1), and it can make no difference whether the tribunal so acting was the management committee or the arbitration committee. The decision was not a decision which the law can recognize, and the Court can clearly restrain the society from enforcing their order. But if the society did not "adjudicate" in the proper sense, if they merely asserted that the appellant had misapplied the funds and expelled him, the appellant was in my opinion equally entitled to apply to the Court to declare the order of expulsion a nullity under the circumstances of this case. Even on this assumption the society have acted in direct opposition to the rules. There was, as I have said, a dispute. The statutes and the rules on the same assumption require that it shall be referred to arbitration. The statutes and the rules bind the society as much as they bind the member. They had no jurisdiction to make an order until the dispute had been settled and it had been established by an order of the only competent tribunal, the arbitrators, that the appellant had misapplied the funds. If this resolution was a nullity, as even in this view it was, the appellant was, I think, entitled to have it so declared, and to have the real dispute, namely, whether he did misapply the funds, settled by the arbitrators. To hold otherwise would impose a most unjust burden on the appellant. The appellant, if the rules had been observed, would have gone before the arbitration committee as a member of the society, and as an innocent member, with the onus upon the society of proving his guilt. But with the decision or resolution of the society standing against him the appellant would have to go before the arbitrators as one who had ceased to be a member, with the stigma of guilt upon him, and also with the onus on him of proving that the

(1) [1905] A. C. 78.

resolution was ultra vires and void. This seems to me to be clear when one remembers what the dispute was which was before the county court judge, and which it is said he ought to have taken before the arbitrators. That dispute was, not whether he was innocent or guilty, but whether the resolution was ultra vires and void.

It was argued that because the appellant could go before the arbitrators he had a remedy. So, it was contended in *Andrews* v. *Mitchell* (1), had the member there. He could have appealed. It was held that that was no answer, and in my opinion it was no answer in this case. In truth, I think he had no effective remedy. As I have said, his position, if he has to arbitrate while the resolution stands, is very different from what it would have been if the rules of the society had been observed. The importance of following the rules before a member is expelled was emphasized by Lord Davey in *Andrews* v. *Mitchell* (2) in these terms : " It is a serious thing to expel a man from a society of which he has been a member, I think it was stated in this case for eighteen years, or something of that kind, and who has no doubt paid his subscriptions for a long period. And although such a power is necessary for the due administration and harmonious working of the society, and a power for that purpose is therefore properly given by the rules, it ought always to be exercised in accordance with the conditions imposed by the rules."

For these reasons I think that the order for the writ of prohibition ought to be discharged. It has been objected that, in any case, the learned county court judge had no power to declare that the appellant was a member of the society. This, however, was a necessary consequence of the declaration that the resolution expelling him was void, it not being suggested that he had otherwise ceased to be a member, and I see no substance in the contention. I doubt if the learned county court judge had jurisdiction to inquire into the guilt or innocence of the appellant, as the only question before him was whether the resolution was ultra vires and void ; but that point was not taken as a separate point, and the writ could not be issued on that ground alone.

I think that the appeal should be allowed, with costs both in this Court and of the proceedings in chambers.

(1) [1905] A. C. 78. (2) [1905] A. C. 78, 82.

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BAILHACHE J. read the following judgment :—

I need not repeat the facts of this case in any detail. The committee of management of the respondent society passed a resolution on December 7, 1915, expelling the appellant from membership. They purported to act under rule 3, sub-rule 2. The appellant had been secretary of the society, and the rule referred to provides that " any officer misapplying the funds shall repay the same and be expelled."

The appellant brought his action in the Ely County Court claiming relief against this resolution upon the ground that it was ultra vires, illegal, and against public policy.

It was objected by the respondents at the hearing that there was no jurisdiction to entertain the action as the expulsion, if objected to, was a dispute which by s. 68 of the Friendly Societies Act, 1896, and s. 6 of the Act of 1908 ought to be decided as provided for by the rules of the society, and by rule 23 the method provided was arbitration.

It was conceded before us that this contention was correct unless the committee, in passing their resolution, had been guilty of misconduct either by acting in violation of natural justice or in breach of these rules : see *Andrews* v. *Mitchell* (1) and *Catt* v. *Wood*. (2).

Natural justice is a vague term, but the particular violation complained of here was that the committee had decided against the appellant without hearing him.

When the committee asserted, as they did some time before passing the expulsion resolution, that the appellant had misapplied the society's funds, the appellant denied it, and thereupon a dispute arose which both parties were bound to refer to arbitration if a decision was desired. Neither party took that course, and the committee proceeded to expel the appellant. This they can only do under rule 3 if the appellant has misapplied the funds. I take that to mean if the appellant has in fact misapplied the funds, and where the fact is disputed the arbitrators are the only body competent under the rules to decide the dispute.

Before waiting for a decision the committee acted as though the appellant was guilty, and in so doing they have, I think, placed

(1) [1905] A. C. 78. (2) [1910] A. C. 404.

themselves in a dilemma. Either they have taken upon themselves to decide the dispute as to the appellant's guilt, in which case they are not the authorized tribunal, or, assuming that they are, they have not acted judicially and have not heard the appellant, as, on that hypothesis, they were bound to do, or else they have proceeded to expulsion before the appellant's guilt has been established by the only competent body, namely, the arbitrators; but that is to assume guilt, and the rule does not say an officer assumed or presumed to be guilty, or who in the opinion of the committee is guilty, may be expelled, but an officer "guilty"—that is, as I think, confessedly or provedly guilty.

It is not unworthy of notice in this connection that rule 11, sub-rule 2, is differently worded. By that rule a member who, in the opinion of the committee of management, is guilty of acting fraudulently as to the funds of the society shall be expelled. The difference is marked, and not, I think, accidental, and it confirms the view I take of rule 3, sub-rule 2.

Now, for present purposes it is immaterial whether the true view of the respondents' conduct is that they have arrogated to themselves the functions of the arbitrators or have acted upon their own opinion as to the appellant's guilt, because, as I have indicated, in the former case they have disregarded their own rules, and have in addition failed to observe the elementary principle of natural justice that no man can be condemned unheard. In the latter case they have acted in a manner which might possibly be justified if they were proceeding under rule 11, but is not justified under rule 3, which is the rule applicable. I say it is immaterial because on any of these grounds the Court will interfere, and the learned county court judge was so far right in entertaining the action and granting an injunction against the respondents proceeding upon their resolution.

The learned judge went further, and found as a fact that the appellant had not been guilty of misapplication of the society's funds. I do not know on what evidence that finding is based, but it seems to me that the learned judge had no power to consider that question, which is one for arbitration under the rules.

The appeal is in form against a writ of prohibition. The appellant

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has succeeded upon the main point, and the appeal must be allowed with costs.

Appeal allowed.

Solicitors for appellant: *Beecher Bryant & Co.*

Solicitors for respondents: *Bridges, Sawtell & Co., for Bendall & Sons, Newmarket.*

J. S. H.

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Dec. 1, 5, 6.

BROKEN HILL PROPRIETARY COMPANY, LIMITED *v.* PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY.

[1915 B. 3490.]

Ship—Bill of Lading—Liberty to Overcarry and Tranship—Mail Steamer—Steamer arriving at Port of Destination of Goods—Goods overcarried and lost after Transhipment—Liability of Shipowners.

The plaintiffs shipped at Sydney on board the defendants' mail steamer *Mooltan* a quantity of lead for delivery at Colombo under a bill of lading which exempted the defendants from liability for loss due to, inter alia, perils of the seas, and which also contained the following clause: "The company are to be at liberty to carry the said goods to their port of destination by the above or other steamer or steamers . . . . proceeding either directly or indirectly to such port, and in so doing to carry the goods beyond their port of destination, and to tranship or land and store the goods either on shore or afloat, and reship and forward the same at the company's expense, but at merchant's risk." When the *Mooltan* arrived at Colombo riots had broken out there, which seriously interfered with the employment of coolie labour and the use of lighters into which cargo had to be discharged, and in consequence of these difficulties and the exigencies of the mail service the *Mooltan* left Colombo without having discharged the plaintiffs' lead, and proceeded to Bombay to get the Indian mail there. The *Mooltan* would have been seriously delayed if she had waited at Colombo to discharge the plaintiffs' lead. At Bombay the lead was transhipped into another steamer, which, while taking it back to Colombo, stranded, and in consequence a portion of the lead was lost. The plaintiffs sued to recover the value of the lead that was lost, and the repayment of certain money paid under protest as a general average deposit, alleging that the loss occurred on a voyage from Bombay to Colombo which was not the voyage contemplated:

Held, (1.), that, under the clause in the bill of lading giving the

defendants liberty to carry goods beyond their port of destination and to reship and forward the same to that port, the defendants were entitled to carry the lead on to Bombay and to send it back to Colombo by another steamer, inasmuch as the parties must have contemplated that as the *Mooltan* was a mail steamer she would have to arrive at and leave the various ports at fixed times, and could not therefore be expected to remain at an intermediate port for an unusual time to discharge her cargo, and (2.) that, as the lead was lost by an excepted peril in the course of the voyage back from Bombay to Colombo, the defendants were protected from liability.

Sargant & Sons v. *East Asiatic Co.* (1915) 21 Com. Cas. 344 not followed.

ACTION tried by Bray J. as a commercial cause.

The plaintiffs were the shippers of and the bill of lading holders in respect of 986 bars of lead loaded on the defendants' steamship *Mooltan* at Sydney as per bill of lading dated May 12, 1915, for delivery at Colombo.

The bill of lading contained the following provisions:—"The act of God, the King's enemies . . . . and all perils, dangers and accidents of the seas . . . . and navigation of what kind soever, and accidents, loss, damage, delay or detention . . . . arising out of or consequent upon the employment of the company's vessels in or assistance rendered by them in the performance of His Majesty's mail service, or loss, delays or any other consequences arising from . . . . riots or civil commotion, or from transhipment or warehousing . . . . or from ships not having room at port of transhipment, are all excepted."

"The company are to be at liberty to carry the said goods to their port of destination by the above or other steamer or steamers, ship or ships either belonging to the company or to other persons proceeding either directly or indirectly to such port, and in so doing to carry the goods beyond their port of destination, and to tranship or land and store the goods either on shore or afloat, and reship and forward the same at the company's expense, but at merchant's risk."

The *Mooltan* was a mail steamer which carried the Australian mail from Australia to Brindisi; in doing so she did not usually proceed, after calling at Colombo, via Bombay, but owing to another vessel, which usually carried the mail from Bombay to Aden, having

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to be docked, the defendants gave notice in Australia by advertisement that on the voyage in question the *Mooltan* would proceed from Colombo via Bombay. With the plaintiffs' goods stowed at the bottom of the hold and with other cargo on the top, the *Mooltan* sailed from Sydney on May 15, 1915, and reached Colombo on June 2, where she received the China mail. At that time there were riots at Colombo, which seriously interfered with the employment of coolie labour and the use of lighters into which cargo had to be discharged. In consequence of these difficulties and the exigencies of the mail service the *Mooltan*, after remaining for some time at Colombo, proceeded to Bombay to get the Indian mail without having discharged the plaintiffs' lead. She would have been considerably delayed if she had waited till she could discharge it. At Bombay the lead was transhipped to the *Nubia*, which, while taking it back to Colombo, stranded, and in consequence a portion of the lead was lost. The plaintiffs now claimed to recover (1.) the value of the lead that was lost, and (2.) repayment of 351*l.* 4*s.* 3*d.* paid under protest as a general average deposit.

The defendants contended that in the circumstances they were justified in taking the lead to Bombay and transhipping it into the *Nubia*, that the loss was caused by an excepted risk, and that they were under no liability to the plaintiffs.

MacKinnon, K.C., and *R. A. Wright*, for the plaintiffs. (1) As there was an unjustifiable deviation the defendants are not entitled to rely on the exceptions in the bill of lading. The clause giving liberty to overcarry does not apply where the vessel has actually entered the port of destination of the goods: *Sargant & Sons* v. *East Asiatic Co.* (2), where the material clause was in the same terms as the clause in this case.

Clavell Salter, K.C., and *Micklethwait*, for the defendants. The clause giving liberty to overcarry the goods must be read in conjunction with the earlier clause exempting the defendants from loss arising out of or consequent upon the employment of their vessels

(1) The argument is confined to the point arising on the clause giving liberty to overcarry and tranship the goods.

(2) 21 Com. Cas. 344.

in the performance of the mail service; and it must be read in the light of the plaintiffs' knowledge that the *Mooltan* was engaged in the mail service, and in the performance of that duty might, in order to keep her time at Bombay, have to leave Colombo without discharging the whole of her cargo there. *Sargant & Sons* v. *East Asiatic Co.* (1) is distinguishable on the ground that the vessel in question in that case was not a mail steamer. [They cited *Hadji Ali Akbar & Sons* v. *Anglo-Arabian and Persian Steamship Co.* (2)]

MacKinnon, K.C., in reply. If a bailee elects to deal with the property entrusted to him in a way not authorized by the bailor, he takes upon himself the risks of so doing, except where the risk is independent of his acts and inherent in the property itself: per Grove J. in *Lilley* v. *Doubleday.* (3) In this case the plaintiffs' goods were improperly put by the defendants on the *Nubia* and were lost by being there. The clause in the bill of lading on which the defendants place reliance has been construed in a way adverse to their contention by Bailhache J. in *Sargant's Case* (1), and it would be extremely unfortunate if a clause in the same terms were to be construed differently in different bills of lading. The fact that the *Mooltan* was a mail steamer cannot affect the construction of the clause; and further, the fact that the defendants may have entered into certain obligations with the Postmaster-General does not absolve them from the obligation of carrying out their contract with the plaintiffs to carry the lead on the specified voyage, namely, from Sydney to Colombo.

BRAY J. I have entertained some doubt in this case, and, although I cannot say I give my decision with perfect confidence, I think that as I have come to a conclusion I had better give judgment at once. [His Lordship then stated the facts, and continued:] The plaintiffs say that the defendants agreed to deliver the lead at Colombo by the *Mooltan* and that they failed to do so. The defendants answer that the lead was lost by perils of the sea, to which the plaintiffs reply that the loss occurred on a voyage from Bombay to Colombo which was not the voyage contemplated. The defendants rejoin that they had liberty to carry the lead beyond Colombo

(1) 21 Com. Cas. 344. (2) (1906) 11 Com. Cas. 219.
(3) (1881) 7 Q. B. D. 510, 511.

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and on to Bombay if circumstances made it reasonably necessary to do so, and that such circumstances existed in this case in view of the state of affairs at Colombo. The defendants further rely on the clause in the bill of lading exempting them from liability for any loss, damage, delay, or detention arising out of or consequent upon the employment of the ship in the performance of His Majesty's mail service, and the further clause exempting them from liability for loss arising from riots or civil commotion. The most difficult clause to construe is that which says that "The company are to be at liberty to carry the said goods to their port of destination by the above or other steamer or steamers, ship or ships either belonging to the company or to other persons proceeding either directly or indirectly to such port, and in so doing to carry the goods beyond their port of destination, and to tranship or land and store the goods either on shore or afloat, and reship and forward the same at the company's expense, but at merchant's risk." I have to construe that clause, and one of the difficulties that arises is the fact that Bailhache J. in *Sargant & Sons* v. *East Asiatic Co.* (1) has placed a certain interpretation upon it. If I thought his decision covered this case, and that there was no real distinction between that case and this, I should follow it. I am not bound by it, but it is a good rule in this Court to follow previous decisions. In *Sargant's Case* (1) Bailhache J., after reading the clauses of the bill of lading, which included one in precisely the same terms as that with which I am dealing, said this: "On examination these clauses do not seem to me applicable to the circumstances of this case. In my judgment it is impossible to find in any of these clauses or in all of them put together a reservation of the right claimed by the defendants, namely, a right to carry goods into their port of destination by the original carrying ship, and then to refuse to deliver them there to the person entitled to demand delivery and who duly makes his demand; to carry them away to some other and perhaps distant port and to return them to their destination in the ship-owners' good time. The clauses relied upon appear to provide for the case of the carrying steamer failing to put into the port of destination, but not for the case of refusal to deliver goods at their port of destination when the original carrying steamer is herself

(1) 21 Com. Cas. 344, 348.

actually in such port for the purpose of delivering cargo." It is undoubtedly a rule of construction that in order to construe a particular clause one must look at the whole of the document, and for that reason it may be that particular words which are identical in two documents may really have a different meaning in each owing to the language of other parts of the contracts. It is a further, and a very important, rule that in construing a document regard must be had to all the circumstances as known to and contemplated by the parties at the time they entered into the contract. In *Butterley Co.* v. *New Hucknall Colliery Co.* (1) the Earl of Halsbury said this: "I think what was said by Lord Blackburn in *River Wear Commissioners* v. *Adamson* (2) and quoted by Farwell L.J. in this case is very relevant here, since I think a great deal of the difficulty of the construction is solved by considering what are the facts to which the language is applied. Lord Blackburn said: In construing a document 'in all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used and what was the object appearing from those circumstances which the person using them had in view, for the meaning of words varies according to the circumstances with respect to which they were used.'"

In this case the steamer in question was a mail steamer, and I cannot doubt that that fact was perfectly well known to the plaintiffs; there is moreover a special provision with regard to mail steamships in this contract which shows that the parties contemplated that there might be damage, loss, delay, or detention arising out of or consequent upon the ship performing duties under the contract with the Postmaster-General. Any one who took that into consideration would know that under the mail contract there are definite days and times when the ship has to be at and to start from particular ports, that at an intermediate port she cannot be expected to stop an unusual time, and that there may be obstacles at that port at the particular time making it necessary for her to leave without having discharged the whole of her cargo. Construing this clause in the light of those circumstances, was it intended

(1) [1910] A. C. 381, 382. (2) (1877) 2 App. Cas. 743, 763.

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to cover such a case as this? The words used are very wide and, if construed according to their usual meaning, are wide enough to include this case. The earlier part of the clause gives the defendants "liberty to carry the said goods to their port of destination by the above or other steamer . . . . proceeding either directly or indirectly to such port." I think it is conceded that the liberty thus conferred applies to every case except where it is sought to be exercised out of mere caprice. The clause then proceeds: "and in so doing"—i.e., in carrying the goods—"to carry the goods beyond their port of destination." I have come to the conclusion that the clause was intended to apply in such a case as this where there were disturbances in the port which would have lengthened very materially the time of discharge, and therefore necessitated the *Mooltan* leaving before the discharge of her cargo destined for Colombo was completed in order that she might perform the mail contract. This was such a case as was, in my opinion, contemplated by the parties. In these circumstances the defendants were entitled to take the goods on to Bombay, tranship them there and send them back to Colombo, and as it was in course of doing so that the goods were lost by perils of the sea the defendants are protected from liability.

I wish to add that I decide this case without expressing any opinion as to whether it may not also be governed by the words in the general exception clause, "loss, damage, delay or detention . . . . arising out of or consequent upon the employment of the company's vessels . . . . in the performance of His Majesty's mail service." There will be judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *Parker, Garrett & Co.*
Solicitors for defendants: *Freshfields.*

J. S. H.

[IN THE COURT OF APPEAL.]

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Jan. 11, 12; *Feb.* 2.

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Ex parte RICHARDSON.

Bankruptcy—Stock Exchange—Defaulting Member—Operation of Stock Exchange Rules—Official Assignee—"Assignment for Benefit of Creditors"—Deed of Arrangement—Non-registration—Supervening Bankruptcy of Member—Rights of Trustee in Bankruptcy—Deeds of Arrangement Act, 1887 (50 *&* 51 *Vict. c.* 57), *ss.* 4, 5—*Deeds of Arrangement Act,* 1913 (3 *&* 4 *Geo.* 5, *c.* 34), *ss.* 37, 42.

The application for admittance to membership of the Stock Exchange, coupled with the Rules of the Stock Exchange and the member's notice of default, operate as an assignment of his property for the benefit of his Stock Exchange creditors, which is a deed of arrangement within the definitions in s. 4 of the Deeds of Arrangement Act, 1887, as extended by s. 37 of the Deeds of Arrangement Act, 1913, and such an assignment, not being registered, is void. Therefore the trustee in bankruptcy of the defaulter is entitled to the assets collected by the official assignee of the Stock Exchange, even although the bankruptcy does not supervene until more than three months after the date of the notice of default.

So *held* by the Court of Appeal (Lord Cozens-Hardy M.R., Warrington L.J., and A. T. Lawrence J.), affirming the decision of Horridge J. [1916] 2 K. B. 902.

Appeal from a decision of Horridge J. (1) raising a question as to the validity of an assignment of the debtor's assets for the benefit of his Stock Exchange creditors, effected by the operation of the Stock Exchange Rules, under the following circumstances :—

The debtor had applied to be and had been duly elected a member of the London Stock Exchange for the year commencing March 25, 1911, and had duly renewed his membership in respect of the year commencing March 25, 1914. Both applications for membership and renewed membership were made in writing, and under and subject in all respects to the Rules and Regulations of the London Stock Exchange for 1911, of which the following are material :

"160.—(1.) A member unable to fulfil his engagements shall be publicly declared a defaulter by direction of the chairman, deputy chairman, or any two members of the committee, and thereby ceases to be a member.

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"(2.) The request for such declaration shall be handed to the secretary not later than a quarter to three o'clock or half-past twelve on Saturday, and the declaration shall be forthwith announced to the Stock Exchange. A declaration shall not be announced before a quarter to eleven o'clock."

"165.—(1.) The official assignee shall collect and pay the assets into such bank and in such names as the committee may from time to time direct, and the same shall be distributed as soon as possible."

On July 29, 1914, the debtor, who was then carrying on his business under the style of T. & E. Halstead, wrote to the secretary of the committee as follows: "Will you kindly inform the House that we are unable to comply with our bargains." The result of this communication was that on the same day the debtor was duly declared a defaulter on the Stock Exchange. There was no notice alleging the debtor to be a defaulter except the one given by himself, and at this time he was hopelessly insolvent and indebted in a large amount to outside creditors as well as to Stock Exchange creditors.

On October 26, 1914, Mr. Richardson, who as the official assignee of the Stock Exchange was collecting the debtor's assets for distribution amongst his Stock Exchange creditors, received a letter from a firm of solicitors stating that the debtor had committed an act of bankruptcy by not complying with a bankruptcy notice that had been served upon him and that they were presenting a bankruptcy petition against him; and on the following November 12 Mr. Richardson received a further letter from the same solicitors stating that the bankruptcy petition had been presented and would be heard on the following December 4. The petition, however, was not presented until November 7, 1914, and a receiving order was made thereon on December 4, and was followed by adjudication. On December 31, 1914, the trustee in bankruptcy wrote to Mr. Richardson informing him that a receiving order had been made against the debtor on the previous December 4.

During 1915 Mr. Richardson, being under the erroneous impression that the petition had been presented on October 26, 1914—i.e., within three months of the previous July 29—paid over sums amounting to 6869*l.* 14*s.* 10*d.* that he had collected to the trustee

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in bankruptcy. In May, 1916, Mr. Richardson first became aware that the true date of the petition was more than three months after July 29, 1914, and thereupon he applied for an order on the trustee to repay him the 6869*l.* 14*s.* 10*d.* on the ground that it had been paid to the trustee under a mistake.

Horridge J. held that the debtor's application for membership of the Stock Exchange, coupled with the Rules and the notice of default, constituted a deed of arrangement within s. 4 of the Deeds of Arrangement Act, 1887, as extended by s. 37 of the amending Act of 1913, and not being registered was void as against the trustee in bankruptcy. The official assignee of the Stock Exchange appealed.

Sir John Simon, K.C., and *E. W. Hansell*, for the appellant. Horridge J. has held that the debtor's letter to the secretary of the committee dated July 29, 1914, requesting him to inform the House that he was unable to comply with his bargain, coupled with his application for readmission to the Stock Exchange in 1914 and the relevant Rules of the Stock Exchange, constituted an instrument which ought to have been registered under the Deeds of Arrangement Act, 1913, s. 37. It is submitted that his decision cannot stand. It is inconsistent with the whole scheme of the Act. There is no instrument here within the Act. A deed of arrangement necessitates a document or documents executed by the debtor for the benefit of his creditors. There is no instrument which effects the transfer of the property. What caused the transfer was the "hammering" or declaration of default. It is necessary to look at the Act of 1887, s. 4, to see what is meant by a deed of arrangement. It means some instrument or instruments made between a debtor and his creditors. Then it must be registered and bear an ad valorem stamp. There was no such instrument here which could be registered. The amending Act of 1913 extended the provisions of the Act of 1887 to the case of an arrangement for the benefit of three or more creditors as well as to a deed for the benefit of creditors generally.

First, then, we submit there is no deed of arrangement here at all within the Act of 1913. The assignment is not effected by any instrument, but in part at any rate arises by reason of the verbal declaration of default.

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Secondly, the Rules of the Stock Exchange and the application for re-election do not constitute an assignment.

Thirdly, if they did, they would not constitute a deed of arrangement within the Act.

In order to constitute a deed of arrangement there must be an assignment by the debtor for the benefit of three or more creditors who must be capable of being identified. The consequences of the hammering of a defaulter on the Stock Exchange were well known in 1913, and the Act cannot have been intended to apply to such a case. *Tomkins* v. *Saffery* (1), *Richardson* v. *Stormont, Todd & Co.* (2), and *Lomas* v. *Graves & Co.* (3) establish the rights and position of the official assignee. On its true construction the Act ought not to be given the effect which has been placed upon it by Horridge J. when its language is so extraordinarily inapt. In any event, there is no instrument here executed after April 1, 1914, the date of the commencement of the Act of 1913. The policy of the Act is directed against instruments of assignment and not against transactions such as are in question in this case.

Upjohn, K.C., and *Giveen*, for the respondent. The effect of the declaration that a member of the Stock Exchange is a defaulter is that he ceases to be a member. If he intimates to his creditors on the Exchange that he is unable to meet his engagements he is a defaulter even if there be no declaration. The objects of the public declaration are (1.) that all the members may be made aware of his default, and (2.) that he may cease to be a member. The act of hammering has nothing to do with the passing of the title to his property to the official assignee : *Tomkins* v. *Saffery*. (1) The passing of the property of the debtor is effected by a document or documents signed by him. The document which passed the property in this case—the cessio bonorum—was the letter of July 29, 1914. It must be admitted that at first sight it does not look like a document intended to pass property, but when coupled with the Rules it is evident that it is a cessio bonorum for the benefit of the Stock Exchange creditors under the Rules. That is the view taken by Lord O'Hagan in *Tomkins* v. *Saffery*. (1) If that be true, then no question of date arises. But if it be wrong, then the document

(1) (1877) 3 App. Cas. 213. (2) [1900] 1 Q. B. 701.
(3) [1904] 2 K. B. 557.

signed by Halstead on his last application for re-election in March, 1914, together with the letter of July 29, 1914, constituted the instrument of assignment. It is not suggested that the document of March, 1914, was itself an assignment of the debtor's assets for the benefit of creditors not then ascertained, but by virtue of it the Rules of the Stock Exchange are brought into operation. The letter of July 29 was written for the purpose of making the debtor's assets subject to the Rules which apply to the assets of a defaulter; and, being signed with that intention, it comes within s. 37 of the Act of 1913 as an "instrument made after the commencement of the Act . . . . for the benefit of any three or more creditors." It also comes within s. 4, sub-s. 2, of the Act of 1887 as "an assignment of property," and it also comes within s. 4, sub-s. 2 (*e*). It is said that it is the act of hammering which passes the title to the property, and that as the declaration is not in writing the transaction cannot be a deed of arrangement within the Act. It is submitted that the declaration by hammering is merely ministerial and completes the letter, which is in itself a deed of assignment. It indicates the acceptance by the creditors of the offer contained in the letter. The mere hammering is no part of the title of the assignee. In *Tomkins* v. *Saffery* (1) bankruptcy proceedings were commenced within three months after the hammering, and it was held in that case that what had happened was a cessio bonorum and amounted to an act of bankruptcy, and that the trustee could recover the assets of the debtor which had been got in by the official assignee. But the learned Lords discussed the effect of a request by a member similar to that contained in the letter of July 29, and said that the moment the request was received by the secretary the cessio bonorum was complete and brought into operation the Rules which entitled the assignee to realize the whole estate of the debtor: see also *Richardson* v. *Stormont, Todd & Co.* (2) and *Lomas* v. *Graves & Co.* (3) There was here, therefore, a cessio bonorum passing the whole of the debtor's assets for the benefit of a limited class of his creditors. The debtor's application for membership and the Stock Exchange Rules operate as an agreement for the alienation of his assets on his insolvency, and a man may not contract to

(1) 3 App. Cas. 213. (2) [1900] 1 Q. B. 701.
(3) [1904] 2 K. B. 557.

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withdraw his assets from the control of his creditors in the event of his bankruptcy: *Whitmore* v. *Mason* (1); *Higinbotham* v. *Holme.* (2) The application for membership together with the Rules of the Stock Exchange and the notice of default operated as an assignment by the debtor of his assets, and was a deed of arrangement within the Acts of 1887 and 1913, and not being registered, is void. A letter may be a good equitable assignment of any property: *Burn* v. *Carvalho* (3); *Richards* v. *Delbridge.* (4) The authorities deal only with the case where the Rules are put into operation by the defaulter himself. It is another question when the secretary is informed by a creditor that a member has failed to comply with his bargains.

[LORD COZENS-HARDY M.R. We have not to deal with that case.]

It is said that the title of the assignee depends upon a series of events, including a verbal declaration of default which cannot be registered. We submit that it depends upon and arises from the letter of July 29, and all the other matters are only relevant as enabling the Court to construe and give effect to the letter. The letter itself is capable of registration.

Sir J. Simon, K.C., in reply.

Cur. adv. vult.

Feb. 2. LORD COZENS-HARDY M.R. This appeal raises an important question as to the effect of what is known as "hammering" on the Stock Exchange. Halsted was admitted a member of the Stock Exchange in 1902 for that year. In 1914 he applied for readmission or re-election for that year. On each occasion the admission was subject to the Rules and Regulations of the Stock Exchange. On July 29, 1914, he was unable to comply with his bargains, and he was declared a defaulter by the usual process of hammering. A petition was presented against him in bankruptcy on November 7, 1914, and a receiving order was made thereon on December 4, and this was followed by adjudication. It is important to observe that the petition was more than three months after July 29, and therefore that the transaction of that date was not an available act of bankruptcy. The official assignee of the Stock Exchange, acting under the Rules to which I must refer

(1) (1861) 2 J. & H. 204, 215.
(2) (1811) 19 Ves. 88.
(3) (1839) 4 My. & Cr. 690.
(4) (1874) L. R. 18 Eq. 11, 14.

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in more detail, took possession of such of the assets as he could obtain, amongst others sums amounting to upwards of 6000*l.*, including his bank balance. The trustee applied for payment of this sum, and the official assignee of the Stock Exchange paid it under the mistake that the petition had been presented on October 26, that is to say, within three months. He now claims repayment of this sum on the ground of mistake, and it has been contended that, as the trustee had in fact no title to this sum, the money ought to be repaid to the official assignee; but if the official assignee had no title, of course he cannot recover it back. Horridge J. has dismissed the application, and hence the appeal.

The Rules of the Stock Exchange relating to defaulters are by no means easy to construe, but so much guidance is afforded by previous decisions, and particularly by the judgments in *Tomkins* v. *Saffery* (1), that I think the effect of the Rules, so far as is in any way material for the decision in this case, is reasonably settled. By rule 160 "A member unable to fulfil his engagements shall be declared a defaulter by direction of the chairman, deputy chairman, or any two members of the committee," and thereby ceases to be a member. The request for such a declaration is to be handed to the secretary, and the declaration is to be forthwith announced to the Stock Exchange, but not before a quarter to eleven o'clock. By rule 165 the official assignee "shall collect and pay the assets into such bank and in such names as the committee may from time to time direct, and the same shall be distributed as soon as possible." Provision is made by subsequent rules for the distribution of the assets so collected between the Stock Exchange creditors. In *Tomkins* v. *Saffery* (1) proceedings in bankruptcy were commenced within three months after the hammering, and it was there held that what had happened amounted to a cessio bonorum and was an act of bankruptcy, and that the trustee in bankruptcy could recover from the Stock Exchange assignee the moneys which he had got in. That was the only point actually decided in the House of Lords, but the noble Lords in that case elaborately discussed the effect of a request by a member precisely similar to that which is found in the present case. Lord Cairns says that what was done by

(1) 3 App. Cas. 213, 222, 223, 230.

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the bankrupt was a general cession of his estate for the purpose of its being dealt with according to the Rules of the Stock Exchange: "There was here on the part of the bankrupt a cession of all the property he possessed for the purposes of his business." Lord O'Hagan says: "The notice of the insolvent was spontaneous; given on no pressure; procured by no request; and involving the surrender of all his assets for the benefit of the specific class of creditors to whom it was addressed. The moment it was received by the secretary, the cessio bonorum appears to me to have been complete. It brought into operation instantaneously the whole machinery of the Rules of the Stock Exchange, and entitled the assignees to realize the entire estate of the debtor. He could not more effectually, with a view to bankruptcy, have yielded up that estate if he had assigned every portion of it by a formal conveyance." Lord Blackburn is not quite so explicit, but there is nothing to suggest that he took a different view. I think, therefore, that in the present case there was a cessio bonorum of all the debtor's assets for the benefit of a limited class of his creditors. I should add that the bankrupt was at the date of his last readmission to the Stock Exchange, and had been ever since, insolvent, and that his creditors outside the Stock Exchange were substantial.

Two questions arise. It is said by the trustee in bankruptcy that a transaction which involved that his whole assets should in the event of his bankruptcy be applied, not for the entire creditors, but for the special class only, is invalid at common law on the principle of *Higinbotham* v. *Holme* (1) and *Whitmore* v. *Mason* (2) and that therefore the Stock Exchange assignee can have no title. On consideration I think this argument cannot prevail. The transaction is not an available act of bankruptcy. It cannot be impeached as a fraudulent preference, and there is no authority which binds me to extend the principle of those cases to circumstances like the present. I agree with Horridge J. on this point.

The other point turns upon s. 37 of the Bankruptcy and Deeds of Arrangement Act, 1913, which came into operation on April 1, 1914, that is to say, after the readmission to the Stock Exchange for that year. Under the Deeds of Arrangement Act, 1887, a deed of arrangement to which the Act applies is void unless registered within

(1) 19 Ves. 88. (2) 2 J. & H. 204, 215.

a certain number of days, and by s. 4 a deed of arrangement to which this Act applies includes (*a*) an assignment of property, (*e*) any agreement or instrument entered into for the purpose of carrying on or winding up the debtor's business or authorizing the debtor or any other person to manage, carry on, realize, or dispose of the debtor's business with a view to the payment of his debts. Now it was held in this Court in *In re Saumarez* (1) that a deed of arrangement was not within that Act unless it was for the benefit of all his creditors as distinct from a particular class. This was altered by s. 37 of the Act of 1913, which provides that: "The Deeds of Arrangement Act, 1887, shall extend to any instrument of the classes mentioned in section 4 of that Act, made after the commencement of this Act by, for, or in respect of, the affairs of a debtor who was insolvent at the date of the execution of the instrument for the benefit of any three or more creditors, in like manner as if such instrument had been made by, for, or in respect of the affairs of the debtor for the benefit of his creditors generally." I think, therefore, that the circumstance that the Stock Exchange creditors are the only persons to benefit by the cessio bonorum is no answer. But it remains to consider whether this cessio bonorum is within the Act. In the first place, the Act only applies to an instrument; it would have no bearing upon a verbal cessio bonorum. This raises the critical point in the present case. It is said that the request by the bankrupt had no operation until the committee acting upon the request declared him a defaulter, and the argument is put even higher, and it is contended that the declaration must be perfected by the customary process of hammering, namely, by the announcement in the Stock Exchange by two waiters of the fact of the declaration. In my opinion this contention cannot prevail. A deed of assignment does not become fully operative until it is delivered by the grantor, but the property does not pass by the mere act of delivery by the grantor; still less can it pass by the "hammering" by two waiters on the floor of the Stock Exchange. Moreover, in the present case the cessio bonorum was not by deed but by letter only. The observations in *Tomkins* v. *Saffery* (2) to which I have referred, though dicta, treat the request itself as an operative creation of the cessio bonorum. In the present case the hammering, in the full sense, was complete

(1) [1907] 2 K. B. 170. (2) 3 App. Cas. 213.

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on the same day as the request, and I see no reason for the distinction which is sought to be made on this point.

In my opinion the application for readmission on the footing of the Stock Exchange Rules was perfected and became operative as a cessio bonorum by the debtor's request on July 29.

It was strongly argued that the Rules of the Stock Exchange contemplate a hammering on the request of a creditor and also by direction of the committee without any request, and that the same principles must apply to hammering whether upon the request of the creditor or without any such request. I do not think it necessary to deal with more than the case before us, where the member himself requested a declaration of insolvency, and I do not propose to express any opinion as to what the result would have been if the hammering had not taken place on the request of the debtor. For these reasons I think that the request, taken with the application for readmission and the relevant rules of the Stock Exchange, is an instrument which ought to have been registered under the Act of 1913, and that, not being so registered, the title of the Stock Exchange assignee is void. This in substance is the view taken by Horridge J. In my opinion the appeal fails and must be dismissed with costs.

WARRINGTON L.J. The bankrupt Walter Francis Halsted was formerly a member of the London Stock Exchange and bound by its Rules.

On July 29, 1914, he wrote to the secretary in the firm name under which he was carrying on business a letter in the following terms: "Will you kindly inform the House that we are unable to comply with our bargains." On the same day a public declaration to the same effect was made in the Stock Exchange in the usual form. The result was that by virtue of the Rules, by which he was bound, the whole of his assets were assigned in equity to the official assignee, whose duty it was to administer them according to the Rules, which provide for the payment thereout of debts arising out of Stock Exchange transactions only. It is admitted that there were more than three creditors in respect of such transactions. The debtor was insolvent on July 29, 1914, and in fact so early as the month of February, 1914. The debtor was adjudicated a bankrupt on a petition presented on November 7, 1914, being more than three

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months after the declaration of default. The present appeal relates to a sum of 6000*l.*, or thereabouts, forming part of the assets of the debtor. It is claimed by the official assignee as having passed to him by the general assignment hereinbefore mentioned. The trustee in bankruptcy claims it on the ground that the assignment was effected by an instrument made after the commencement of the Bankruptcy and Deeds of Arrangement Act, 1913, by a debtor who was insolvent at the date of its execution, for the benefit of three or more creditors, and that accordingly the instrument required registration under the Deeds of Arrangement Act, 1887, and, not having been so registered nor having been stamped as provided by the Act, was void.

He further contends that if this first point fails the general assignment was void as against him on a more general ground which I will advert to presently.

Horridge J., sitting in bankruptcy, has decided in favour of the trustee on the first point and against him on the second. The official assignee appeals.

The first question then is, was the general cessio bonorum admittedly resulting from the declaration of default, with its attending circumstances, effected by an instrument made after April 1, 1914, the date of the commencement of the Act of 1913 ?

The material facts are as follows: A member of the Stock Exchange is elected for one year only from March 25 in each year: see *Cassel* v. *Inglis*. (1) A candidate for re-election is required to address to the secretary a letter in a form specified in the appendix to the Rules, and his re-election is notified in writing on a form also set out in the appendix. The bankrupt was originally elected on March 3, 1902. A short time prior to March 14, 1914, he addressed to the secretary a letter in the required form. The material part was in the following terms: "Please acquaint the committee for general purposes that I am desirous of being re-elected a member of the Stock Exchange for the year commencing on the 25th March, 1914, upon the terms of and under and subject in all respects to the Rules and Regulations of the Stock Exchange which now are or hereafter may be for the time being in force." This letter was signed by the bankrupt. He was re-elected on March 14, 1914,

(1) [1916] 2 Ch. 211.

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for the ensuing year. The Rules provide (159) for the election of an official assignee, whose duty it is, amongst other things, to manage the estate of a defaulter in conformity with the Rules, Regulations, and usages of the Stock Exchange. Rule 160, sub-rule 1, is in the following terms: "A member unable to fulfil his engagements shall be publicly declared a defaulter by direction of the chairman, deputy chairman, or any two members of the committee, and thereby ceases to be a member." Rule 160, sub-rule 2, provides that the request for such declaration shall be handed to the secretary not later than a certain hour, and shall be forthwith announced to the Stock Exchange. On the construction of this rule I feel no doubt that the request there referred to is a request by the member himself, and that by using the word "handed" the rule contemplates that the request shall be in writing. Rule 162 makes provision for the declaration of a member as a defaulter in two other cases: first, where communication of a private intimation to his creditors of his inability to perform his engagements is made to the chairman, deputy chairman, or any two members of the committee, and, secondly, where the committee shall obtain knowledge of any private failure. I am of opinion that in all three cases the officers named have no discretion in the matter, but are bound to give the necessary direction. In the case of a request by the member himself, therefore, the declaration of him as a defaulter is the necessary consequence of his act in making the request. Rule 165, sub-rule 1, provides that the official assignee shall collect and pay the assets into such bank and into such names as the committee may from time to time direct, and the same shall be distributed as soon as possible. Rule 169 excludes from proof against a defaulter's estate claims not arising from a Stock Exchange transaction. It is well settled that when rule 165, sub-rule 1, is brought into operation the effect is to create an assignment of all the assets of the defaulter to the official assignee: *Richardson* v. *Stormont, Todd & Co.* (1); *Lomas* v. *Graves & Co.* (2) In the present case, as already mentioned, on July 29, 1914, the debtor handed to the secretary the request mentioned in rule 160, sub-rule 2, and, the secretary having obtained the necessary direction, the debtor was publicly declared a defaulter in the form usual in such cases.

(1) [1900] 1 Q. B. 701. (2) [1904] 2 K. B. 557.

Rule 165, sub-rule 1, was thus brought into operation and an assignment of all the debtor's assets to the official assignee was created.

I now turn to the Deeds of Arrangement Act, 1913. Sect. 4, sub-s. 2, of the Act of 1887 is in the following terms: "A deed of arrangement to which this Act applies shall include any of the following instruments, whether under seal or not, made by, for, or in respect of the affairs of a debtor for the benefit of his creditors generally (otherwise than in pursuance of the law for the time being in force relating to bankruptcy), that is to say:—(*a*) An assignment of property." The other instruments named are immaterial. Sect. 5 is as follows: "From and after the commencement of this Act" (January 1, 1888) "a deed of arrangement to which this Act applies shall be void unless the same shall have been registered under this Act within seven clear days after the first execution thereof by the debtor . . . . and unless the same shall bear such ordinary and ad valorem stamp as is under this Act provided." Sect. 6 provides for the mode of registration, including the presentation to and filing with the registrar of a true copy of the "deed" and the production of the original duly stamped, and s. 7 for the keeping of a register wherein shall be enrolled an abstract of the contents of every "deed" containing the following, amongst other, particulars: (*a*) the date of the "deed"; (*c*) a short statement of the nature and effect of the "deed." By s. 37 of the amending Act, 1913, it is enacted: "(1.) The Deeds of Arrangement Act, 1887, shall extend to any instrument of the classes mentioned in section 4 of that Act, made after the commencement of this Act" (that is, April 1, 1914) "by, for, or in respect of, the affairs of a debtor who was insolvent at the date of the execution of the instrument for the benefit of any three or more creditors, in like manner as if such instrument had been made by, for, or in respect of the affairs of the debtor for the benefit of his creditors generally."

Do these statutory provisions apply to the transaction in the present case?

I think, as a matter of law, it is clear that, except cases in which by virtue of some statute an involuntary transfer of property takes place on the happening of some event, the transfer of property from one person to another can only be effected by some act of volition on the part of the transferor. In my opinion the necessary

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act of volition in the present case was the writing and signing by the bankrupt of the letter of July 29, 1914. It is true that that document did not in terms assign or transfer any property, and it is also true that to produce that effect certain acts on the part of other persons had to take place, namely, the direction by the prescribed officer and the subsequent public declaration; but in my opinion the letter must be read as if it in terms referred to the Rules and requested that they might be brought into operation, and inasmuch as a man must be taken to intend the necessary consequences of his acts, and as in my opinion the public declaration bringing the Rules into operation was a necessary consequence of the letter, the letter itself effectuated the assignment.

There is no direct authority on the point, but the expressions of Lord O'Hagan in *Tomkins* v. *Saffery* (1) are, I think, obviously founded on this view. Speaking of a similar letter in the case then before the House of Lords, he says: "The moment it was received by the secretary, the cessio bonorum appears to me to have been complete. It brought into operation instantaneously the whole machinery of the Rules of the Stock Exchange, and entitled the assignees to realize the entire estate of the debtor. He could not more effectually, with a view to bankruptcy, have yielded up that estate if he had assigned every portion of it by a formal conveyance." I am not impressed with the suggested difficulties as to registration. I cannot see why the letter should not have been registered together with a copy of the submission to be bound by the Rules, the material rules themselves, and the notice of re-election. The instrument would be made on the date of the letter of request; the other documents are only material as impliedly incorporated in the letter and necessary to explain it. There would be no difficulty in stamping the letter.

I would add this caution: We are dealing only with the case in which the member himself requests the public declaration, and I desire to express no opinion as to what would be the result in either of the other two cases in which a man may be declared to be a defaulter. To these different considerations may obviously apply.

The result is that in my opinion the judgment of the learned

(1) 3 App. Cas. 213, 230.

judge on the point I have so far been dealing with is correct and ought to be affirmed.

This is enough to dispose of the appeal, but as a good deal of argument has been addressed to us on the second point raised by the trustee, I think it right to express my opinion upon it. It is contended that the general cessio bonorum in favour of certain particular creditors is void as infringing the principle acted on in *Higinbotham* v. *Holme* (1) and *Whitmore* v. *Mason* (2) that a man cannot as against his creditors so dispose of his own property that in the event of bankruptcy it shall pass away to another. I think the answer is that the event in which in the present case the cessio bonorum was to take effect was not bankruptcy but inability to fulfil certain engagements which might or might not involve bankruptcy, and that the principle of the above-mentioned decisions does not apply. Moreover, as was pointed out in *Tomkins* v. *Saffery* (3), the Rules were not intended to, and do not in fact, override the provisions of the Bankruptcy Act. The cessio bonorum is admitted to be an act of bankruptcy, and if happening within three months preceding the presentation of a petition would be avoided by the relation back of the trustee's title. So also, if it is to be regarded as a preference of the Stock Exchange creditors, it would be avoided as against the trustee, but subject to the same limitation as to time. If we were to accept the contention of the trustee, we should, I think, be avoiding a transaction which the Legislature has not thought fit to avoid. I do not forget that the provision for transfer of property in *Whitmore* v. *Mason* (2) specified insolvency as well as bankruptcy as an event in which the transfer was to take effect, but the event which happened was bankruptcy, and the principle of the decision is, I think, confined to this.

On this point also I agree with the learned judge, but of course this makes no difference to the result, which is that in my judgment the appeal fails and must be dismissed.

A. T. LAWRENCE J. I agree.

The case raises an important question as to the operation upon the general assets of a member of the Stock Exchange of his being

(1) 19 Ves. 88. (2) 2 J. & H. 204, 215.
(3) 3 App. Cas. 213.

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declared a defaulter. It has no concern with the artificial fund which arises from the closing of his open accounts at the prices ruling at the moment of the announcement.

It is admitted, nay asserted, that there is a complete cessio bonorum of all assets to the official assignee of the Stock Exchange, who is the applicant here. This forms the foundation of the claim.

That there is a cessio bonorum is good law, as is shown by the cases of *Tomkins* v. *Saffery* (1), *Richardson* v. *Stormont, Todd & Co.* (2), and *Lomas* v. *Graves & Co.* (3) The question is how does it come to pass ? What is the modus operandi by which, for example, choses in action vested in the debtor vest in the official assignee ?

The learned and exhaustive argument for the appellant says, as I understand it, that it is by the act in pais called " hammering."

It is necessary to say this in order to establish the assertion that it does not pass by virtue of a document that would need registration and stamping under the Deeds of Arrangement Acts, 1913 and 1887. The language of these Acts is so comprehensive that it would be difficult to imagine any " document " made after April 1, 1914, by which property was transferred by an insolvent debtor for the benefit of three or more creditors which did not come within it. Sir John Simon attempted, by an examination of the words of the enactments, to show that no document involved in this case could be the subject of registration ; but he quite failed to show that there was any greater difficulty in registering these documents than in registering those mentioned in s. 4 of the Act of 1887. The question then is, does this property pass by act in pais ? It does not pass by operation of law. There is no statute and no decree of a competent Court under which it can be said to pass. There is no other mode of passing property known to me except the intention of the owner, evidenced by acts or words from which such intention can be reasonably and surely deduced. Here there is no evidence of any act or word of the debtor save his letter of application for re-election as a member of the Stock Exchange which he signed some day in March, 1914, and his letter of request to the secretary to " inform the House " that he was " unable to comply " with his bargains. This he signed upon July 29, 1914. These were not acts

(1) 3 App. Cas. 213. (2) [1900] 1 Q. B. 701.
(3) [1904] 2 K. B. 557.

in pais, but " documents " duly signed and handed over. It was said the ceremony of hammering passed the property. How a Stock Exchange " waiter " could transfer a bank balance belonging to another person by striking a desk with a hammer was not explained.

The cases above cited treat the cessio bonorum as a result of the Rules, and this it manifestly must be. The Rules derive their power over the property of a member from the fact that his application for election expressly asks for membership " upon the terms of and under and subject to the Rules and Regulations of the Stock Exchange which now are or hereafter may be for the time being in force."

This application was made before April 1, 1914, and therefore before the Act of 1913 came into force. It would therefore not need registration if it stood alone, but neither would it pass property if it stood alone. The assignment takes place later. Its time is fixed by the " hammering." The hammering, though not so named in the Rules, takes place under them in accordance with the ancient usage of the Stock Exchange. In this particular case the Rules and the hammering under them were put in operation and were intended so to be by the debtor's letter of July 29, 1914. The letter of application was in my judgment a continuing promise to be bound by the Rules, and this letter was a request to act in accordance with and to enforce the Rules. It was therefore an equitable assignment of all his assets, it was made by an insolvent person, and it was made for the benefit of more than three creditors. It was not registered or stamped within seven days or at all, and is therefore void under the statute of 1913, s. 37. The mischief aimed at by the statute appears to me to be just as great in the case of a stockbroker as of any other business man. Ordinary persons are just as likely to be misled into giving credit to a stockbroker as to a merchant or any other person.

For these reasons I think the judgment of Horridge J. is correct and should be affirmed.

Solicitors for appellant: *Travers-Smith & Braithwaite.*
Solicitors for respondent: *Cohen & Cohen.*

G. A. S.

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Feb. 6, 9.

ROE *v.* R. A. NAYLOR, LIMITED.

Contract—Sale of Goods—Sold Note—Condition—Assent of Buyer.

Where a seller of goods hands to the buyer a sold note which the buyer accepts as being the contractual document, it is no part of the seller's duty to call the buyer's attention to the terms of the note, and the buyer is bound by any conditions contained in the note, although he may not have read them, or have known that the note contained any conditions, unless the conditions are printed in such a manner or are in such a position in the note as to mislead a reasonably careful business man; in which case the note must be read as if it did not contain the conditions.

Appeal from the county court of Staffordshire holden at Wolverhampton.

The plaintiff was a builder and the defendants were timber merchants. On February 11, 1916, the defendants' traveller called on the plaintiff and the plaintiff gave him an order for four lots of timber at the prices shown in a specification which the traveller produced. On the following day the traveller left at the plaintiff's office a sold note which stated that the defendants had sold to the plaintiff the timber in question. The defendants having failed to deliver a part of the timber, the plaintiff brought this action claiming damages for breach of contract. The defendants by way of defence relied on the following words which were printed along the left-hand side of the sold note: "Goods are sold subject to their being on hand and at liberty when the order reaches the head office."

The plaintiff, in giving evidence, said that he had looked at the sold note and saw that it agreed with the specification, but that he did not notice the printed clause, and he did not know that that condition was a term of the contract.

The county court judge found that the contract between the parties was contained in the sold note, that the defendants did not take reasonable steps to bring to the attention of the plaintiff the condition on the sold note, which was printed in very small type, and that the plaintiff was telling the truth when he said that he neither read the printed clause nor was aware of its being in the sold note. The county court judge gave judgment for the plaintiff. The defendants appealed.

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C. Atkinson, K.C., and *Arthur Ward*, for the defendants. The plaintiff put in evidence the sold note as being the contract between the parties and the county court judge has found that it was the contract. In accepting the sold note as the contract the plaintiff must be taken to have assented to its terms; otherwise there was no contract on which the plaintiff could sue: *Parker* v. *South Eastern Ry. Co.* (1); *Cooke* v. *Wilson, Sons & Co.* (2)

J. G. Hurst, for the plaintiff. The question which the county court judge had to try was one of fact, namely, whether the plaintiff by accepting the sold note was bound by the condition, which he had not read and did not know was in the document. The county court judge has found the facts in favour of the plaintiff and has properly directed himself as to the law: *Henderson* v. *Stevenson.* (3) The present case may be regarded as coming within the first and third exceptions in *Watkins* v. *Rymill* (4)—that is to say, it is a case in which the plaintiff not unreasonably supposed that the document contained no conditions, and the document was misleading and did actually mislead the plaintiff: see also *Richardson, Spence & Co.* v. *Rowntree.* (5) There is no distinction in principle between the ticket cases and cases where the contract is one of a commercial character. In *Watkins* v. *Rymill* (4) the question turned on a business contract.

BAILHACHE J. This is an interesting case. The action was brought by the plaintiff against the defendants, who are timber merchants, to recover damages for breach of a contract by which the defendants sold to the plaintiff certain timber. It is the practice of the defendants to send out travellers to obtain orders for their timber. The travellers are provided with a specification of the quantity and description of the timber which the defendants have at their disposal; the specification is shown by the travellers to the customers, and orders are obtained for the timber contained in the specification. But it is necessary for the defendants to safeguard themselves against the risk of the same timber being sold two or three times over, and they do so by inserting in the sold note a clause that "Goods are sold subject to their being on

(1) (1877) 2 C. P. D. 416.
(2) (1916) 85 L. J. (K.B.) 888.
(3) (1875) L. R. 2 H. L. Sc. 470.
(4) (1883) 10 Q. B. D. 178, 188.
(5) [1894] A. C. 217.

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hand and at liberty when the order reaches the head office." That is a very ordinary condition in contracts of this kind. The plaintiff ordered some timber from one of the defendants' travellers. No sold note was given to him at the time, but a day or two later the traveller called on the plaintiff again and left a sold note which contained in very small print on the left-hand side of the paper a clause in the above terms. The plaintiff looked at the sold note and checked the description and prices of the timber, and as they were correctly stated he did not trouble further about the other contents of the document. It subsequently turned out that when the order reached the defendants' head office two of the lots which had been sold to the plaintiff were not available, and consequently they were not delivered to the plaintiff. The plaintiff then brought this action. The defendants relied on the clause in the sold note; but the county court judge gave judgment for the plaintiff for damages. [The learned judge stated the findings of the county court judge as set out above, and continued:]

The question raised by this appeal is whether the county court judge has directed his mind to the proper question. I take the law to be that when the parties to a contract of sale exchange bought and sold notes, or when the seller hands to the buyer a sold note which is accepted by the buyer as being the contractual document, it is no part of the seller's duty to request the buyer to agree to the terms contained in the sold note or to call his attention to its terms. If the buyer accepts the sold note without reading it he does so at his own risk. He is bound by any conditions which may be in the note even if he has not read them. What are sometimes called the ticket cases are not in point; there seems to me to be a broad distinction between that class of case and the case of a contract of sale. There is, however, in my opinion, one exception to the rule that a buyer who accepts a sold note is bound by its terms even though he has not read them. The note may be misleading. The conditions may be so ambiguously worded that they may be read equally well in two different ways; or the conditions relied on by the seller may be placed in such a position in the document that a man of ordinary care and intelligence would not expect to find them there. For example, if the document contains a description of the articles dealt in by the seller, or a list of branch

businesses, and mixed up with matter of that kind was a clause like the one in question or a strike clause, the purchaser might very reasonably say that he never expected to find an important condition of the sale in that part of the document, and in a case of that sort he would not be bound by the condition. Nor would he be bound if the condition was printed in such small or illegible type as to be unreadable by a person of ordinary eyesight.

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Therefore the question in the present case is whether this printed clause is a clause which is so printed that from its position in the document and the size of the type an ordinary careful business man, reading the document with reasonable care, might miss it. In order to escape being bound by a clause the buyer must be able to satisfy a judge or jury that the document was misleading in some or one of the ways which I have indicated, though possibly there may be others. In this case the question may be put thus: Taking the smallness of the print, and the fact that the clause is printed along the side of the document, can a reasonably careful business man be heard to say that he did not see the clause, and could not have been expected to see it? If so, he is not bound by the clause.

Then it is said that if that is the case the parties were never ad idem and there was no contract on which the plaintiff could sue. I do not agree that that is the result. If the county court judge finds as a fact that the plaintiff was misled, and that he did not know of the clause, the note must be read as if the clause was not in it.

As I do not feel sure that the county court judge has directed his mind to the proper question, which is entirely one of fact, I think there must be a new trial.

ATKIN J. I agree. When the question is whether a particular document has been assented to as containing contractual terms two points arise for consideration: First, has a contract been entered into on the terms of the written document? In order to decide that the question to be considered is, did the party offering the document convey to the other party that there were some written terms in the document? If the other party did not know of the existence of those written terms, then the question arises whether the first party took reasonable steps to inform him that

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the document contained some writing which was part of the contract. But there is another class of case in which by a clear course of business between the parties a certain document is understood to be the contract or to be a record of the terms of the contract. In that case the only question which can arise is whether the terms have been assented to. If a party signs the document he is taken to have assented to the terms contained in it. If, although he has not signed the document, he has received it without dissent, he would also prima facie be taken to have assented to the terms. But in both cases the issue might arise whether a particular clause was one of the terms so assented to. In that case the question would be, was the document in such a form that a reasonable man reading the document with reasonable care might and did fail to see that the particular clause in question formed part of the contractual terms? That is a question of fact. It is within one's experience that a document sometimes incorporates other documents containing statements in such a form that a printed contractual term might possibly be overlooked. I do not think that the county court judge really addressed his mind to the question whether the plaintiff had assented to the clause relied on by the defendants. His findings of fact are consistent with the view that the question which he was considering was whether the sold note constituted the contract between the parties. I agree that if it be the fact that the plaintiff did not assent to the clause the result would be, not that the parties were never ad idem, but that the plaintiff had been led by the defendants to believe that the contract was one which did not contain the clause in question.

Appeal allowed; new trial ordered.

Solicitor for plaintiff: *E. L. Feibusch, Wolverhampton.*

Solicitors for defendants: *Davenport, Cunliffe & Blake, for Tatham & Worthington, Manchester.*

F. O. R.

CARRINGTON *v.* DEANE.

1917
Feb. 9.

County Court — Practice — Equitable Execution — Receiver — Costs — Scale—"Amount of debt and costs"—County Court Rules, Order XIII., *r.* 14.

Order XIII., r. 14, of the County Court Rules provides that where a receiver is appointed by way of equitable execution, and "the amount of debt and costs" due to the applicant exceeds 50*l.* and does not exceed 100*l.*, the total amount to be allowed for the costs of obtaining the appointment of the receiver shall not exceed "2½ per cent. of the amount of such debt and costs":—

Held, that, in determining, for the purpose of taxation, "the amount of debt and costs," the costs incurred by the applicant in obtaining an interim injunction to restrain the defendant from dealing with the property the subject-matter of the application for the appointment of a receiver pending the hearing of the application, ought not to be added to the amount of the judgment debt.

Appeal from Wandsworth County Court.

The plaintiff recovered judgment in the county court against the defendant for 97*l.*, being as to 73*l.* debt and 24*l.* costs. On March 30 he gave notice of an application for the appointment of a receiver, by way of equitable execution, of the defendant's interest under a marriage settlement. On April 3 the plaintiff applied for, and obtained, an injunction restraining the defendant from dealing with the settled property pending the hearing of the application for the appointment of a receiver. On June 26 the county court judge made an order appointing the receiver, and by another order on the same date he discharged the injunction and ordered the plaintiff's costs of applying for the injunction to be added to the judgment debt.

The registrar on the taxation of the plaintiff's costs of the application for the appointment of the receiver held that the costs of the application for the injunction must be added to the amount of the judgment debt of 97*l.*, thus bringing the total amount to more than 100*l.*; and he taxed the costs on the scale applicable where "the amount of debt and costs" exceeds 100*l.* (1) The defendant

(1) By Order XIII., r. 14, of the County Court Rules: "Where a receiver is appointed by way of equitable execution, fees may be

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having brought in objections to the taxation, the county court judge held that the registrar had taxed on the proper scale. The defendant appealed.

Wallington, for the defendant. In order to determine on what scale the costs of the appointment of the receiver should be taxed, it was wrong to add to the original amount of the debt and costs the costs of obtaining the interim injunction. The application for the injunction, though in form a separate application, was in reality part of the application for the receiver. The words "debt and costs" in Order XIII., r. 14, refer to the amount for which judgment was originally recovered.

Rose-Innes, K.C. (*S. Duncan* with him), for the plaintiff. Order XIII., r. 14, speaks of "debt and costs," not of "judgment debt." The county court judge, acting within his jurisdiction, ordered the costs of the injunction to be added to the judgment debt, and therefore those costs formed part of "the amount of debt and costs" at the time of taxation, and as that amount exceeded 100*l.* the costs were taxed on the proper scale.

BAILHACHE J. This is an appeal from a decision of a county court judge on a question of costs. The plaintiff had obtained judgment against the defendant for the sum of 97*l.*, debt and costs. He applied in the county court for, and subsequently obtained, the appointment of a receiver by way of equitable execution of the defendant's interest under a marriage settlement. He also obtained an interim injunction restraining the defendant from dealing with the settled property pending the hearing of the application for a receiver. When the receiver was appointed the county court judge discharged the injunction and ordered the plaintiff's

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charged and costs may be allowed as on an interlocutory application in an equitable action or matter. Provided that—(1.) Where the amount of debt and costs due to the applicant exceeds fifty pounds, but does not exceed one hundred pounds, the total amount to be allowed for fees and costs (exclusive of the allowance to the receiver, but including the costs of obtaining his appointment, completing his security, passing his accounts, and obtaining his discharge) shall not exceed two and a half per cent. of the amount of such debt and costs in respect of fees, or the like amount in respect of costs."

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costs of the injunction to be added to the judgment debt. The question which we have to determine is on what scale ought the plaintiff's costs of the application for the appointment of the receiver to be taxed. That depends on Order XIII., r. 14, of the County Court Rules, which provides that where "the amount of debt and costs" due to the applicant exceeds 50*l.*, but does not exceed 100*l.*, the costs shall not exceed 2½ per cent. of the amount of the debt and costs. Therefore, if one merely takes the amount of debt and costs due to the applicant in this case at the time when the proceedings for the appointment of the receiver were instituted, the amount was less than 100*l.*, but if the costs of the injunction are to be taken into account it makes the debt and costs more than 100*l.* It is said for the plaintiff that the latter is the correct view and that the costs have therefore been rightly taxed on the scale applicable where the amount exceeds 100*l.* I do not think so. In my opinion the words "the amount of debt and costs" in Order XIII., r. 14, mean the amount of debt and costs due at the time when the application for the appointment was first made, that is to say, when the notice of the application was given. I do not think that it was intended that the costs of obtaining an interim injunction, which was merely one step in the proceedings for the appointment of a receiver, should be added to the original amount of the debt and costs for the purpose of making that amount over 100*l.* I think these costs were taxed on the wrong scale, and that the appeal must therefore be allowed.

ATKIN J. I agree. It is quite clear from the language of Order XIII., r. 14, that the costs of the application for the appointment of a receiver cannot be taken into account in ascertaining whether the amount of the debt and costs exceeds 100*l.* Those costs are expressly excluded, and therefore it seems to me equally clear to exclude the costs of auxiliary or ancillary applications which it may be necessary to make in the course of the proceedings for the appointment of the receiver.

I do not express any final opinion as to the date at which the amount of the debt and costs is to be ascertained; it may be the date when the application for the receiver is started, or it may be

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the date when the order appointing the receiver is made. But I am quite clear that any costs which are merely incidental to the application for a receiver must not be taken into account in determining the scale upon which the costs of obtaining the receiver are to be taxed.

Appeal allowed.

Solicitor for plaintiff: *J. Hands.*
Solicitors for defendant: *Hanne & Son.*

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Jan. 17, 18; *Feb.* 15.

JOHN FOWLER & CO. (LEEDS), LIMITED, APPELLANTS *v.* ASSESSMENT COMMITTEE OF HUNSLET UNION AND OTHERS, RESPONDENTS.

Poor Rate—Appeal—Special Sessions—Appellant partly successful—Right of Appeal to Quarter Sessions—Rateable Value—Gross estimated Rental—Evidence—Admissibility—Parochial Assessments Act, 1836 (6 *&* 7 *Will.* 4, *c.* 96), *ss.* 6, 7.

The appellants, the owners of certain premises, appealed to special sessions against the amount of the gross estimated rental and of the rateable value at which their premises had been assessed for the poor rate. The special sessions reduced the amount of the gross estimated rental and of the rateable value, but in neither case to so low a figure as had been contended for by the appellants. The appellants gave notice of appeal to quarter sessions on the ground that both amounts as determined by the special sessions were too high. Before the hearing of the appeal at quarter sessions the appellants withdrew their appeal so far as it related to the gross estimated rental. At the hearing the respondents, who had not given notice of appeal against the decision of the special sessions, tendered evidence to prove that the true amount of the gross estimated rental was in excess of the figure arrived at by the special sessions, but the evidence was rejected:—

Held, that although the decision of the special sessions was partly in favour of the appellants they were entitled, as persons "impugning" the decision within the meaning of s. 6 of the Parochial Assessments Act, 1836, to appeal to quarter sessions; and that as the respondents had not appealed against the decision

of the special sessions the evidence tendered by them at quarter sessions had been rightly rejected.

Horton & Son v. *Walsall Assessment Committee* [1898] 2 Q. B. 237 and *Hendon Paper Works Co.* v. *Sunderland Assessment Committee* [1915] 1 K. B. 763 followed.

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JOHN FOWLER & CO. (LEEDS), LIMITED v. HUNSLET ASSESSMENT COMMITTEE.

SPECIAL CASE stated by the Recorder for the city of Leeds.

The appellants (1), John Fowler & Co. (Leeds), Limited, were the owners and occupiers of certain premises used as engineering and boiler works, with their appurtenances, and by a poor rate for the township of Hunslet made on April 1, 1915, they were assessed in respect thereof at the sums of 14,740*l.* as the gross estimated rental and 6850*l.* as the rateable value. The appellants gave due notice of their intention to appeal to the next special sessions against the rate. The grounds of the appeal were (inter alia) incorrectness in the valuation of the premises in respect of the gross estimated rental and the net annual value of the premises.

At the special sessions the appellants called evidence to show that 7380*l.* was the gross estimated rental and 4060*l.* was the rateable value. The case for the respondents was that 17,053*l.* was the gross estimated rental and 9163*l.* was the rateable value. Special sessions allowed the appeal, the gross estimated rental being reduced to 11,800*l.* and the rateable value to 6300*l.*, and the respondents were ordered to pay the appellants' costs to the extent of 100*l.* No application was made by the appellants for costs, and their solicitors immediately upon judgment being given stated that the appellants regarded the reduction as inadequate. Upon the application of the respondents' solicitors the rate-book was altered by the magistrates in accordance with their finding.

On February 16, 1916, the appellants gave due notice of their intention to appeal against the decision of the special sessions to quarter sessions. The grounds of appeal, so far as is material, were : (1.) that the gross value and (2.) that the rateable value of the hereditaments arrived at in the decision of the special sessions were excessive and not in accordance with the statutes in that case made and provided. By a letter dated March 6, 1916, the appellants gave notice to the respondents that they did not

(1) The terms appellants and respondents in this report refer to the position of the parties at quarter sessions.

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propose to proceed with the first ground of appeal, and that they accepted the gross estimated rental as fixed by the special sessions.

On the appeal coming on for hearing before the Recorder the respondents contended by way of preliminary objection that the appellants had no right of appeal from the decision of the special sessions because they were the parties in whose favour the decision was made, and the respondents contended that the terms of s. 6 of the Parochial Assessments Act, 1836 (1), showed that if an appellant against a rate elected to appeal to special sessions under s. 6 and obtained any substantial reduction of his assessment before that Court he could not appeal against the decision of that Court to quarter sessions. The respondents further contended that the reduction granted as aforesaid by the special sessions was a substantial reduction, and that the order that the respondents should pay to the appellants 100*l.* for costs showed that the appellants were the parties in whose favour the decision of the special sessions had been made.

The appellants contended that they were persons impugning the decision of the special sessions within the meaning of s. 6, and were therefore entitled to appeal.

The Recorder held that the appellants were entitled to appeal against the decision of the special sessions, and he overruled the respondents' objection.

After the preliminary objection had been overruled the appellants by their counsel stated that they were prepared to accept as correct the gross estimated rental of 11,800*l.* as fixed by the special sessions, and they contended that the respondents, not having given notice of appeal against the decision of the special sessions, were not entitled to contend that the gross estimated rental as fixed by the special sessions was wrong; and the appellants claimed to deduct from the sum of 11,800*l.* the sum of 7890*l.* as representing the cost of repairs, insurance, and other expenses necessary to maintain the premises in a state to command the gross estimated rental of 11,800*l.*, and on this ground the appellants contended that the rateable value should be reduced from 6300*l.* to 3910*l.*

The respondents contended that the issue before the Court on an appeal from special sessions to quarter sessions must be the

(1) See note on p. 735, post.

same as the issue before the special sessions; that the appellants were not entitled to accept the gross estimated rental of 11,800*l.* as fixed by the special sessions so as to preclude the respondents from giving evidence to show, as they contended was the fact, that the true gross estimated rental of the premises was at least as high as the sum of 14,740*l.*, the figure which had originally been entered in the rate appealed against; and that as the sum of 11,800*l.* was not fixed by the respondents, but by the special sessions, the respondents were not bound by the sum of 11,800*l.* so as to be precluded from giving evidence of what was the true gross estimated rental.

The appellants contended that they were entitled by accepting the gross estimated rental of 11,800*l.* fixed by the special sessions to bind the respondents to that figure, and that the respondents, not having given any notice of appeal, were not at liberty to contend, or to endeavour to prove, that the true gross estimated rental was some higher figure.

The Recorder upheld the appellants' contention, and as it appeared to him on evidence put before him by the appellants and denied by the respondents that the respondents, the assessment committee of the Hunslet Union, and the appellants had agreed that for the purpose only of the appeal to quarter sessions the deduction to be made from the gross estimated rental should be taken at 7890*l.*, the Recorder accordingly deducted that sum from the gross estimated rental of 11,800*l.* fixed by the special sessions, thus reducing the rateable value of the premises from 6300*l.* to 3910*l.*

The questions for the opinion of the Court were: (1.) whether the respondents were right in contending that the appellants could not appeal to quarter sessions on the ground that the appellants did not come within the terms of s. 6 of the Parochial Assessments Act, 1836; (2.) whether the respondents were right in contending that, on an appeal from special sessions under s. 6, the issues must be the same as they were at special sessions, and, therefore, that it was open to the respondents to rely on the same points in answer to the appellants' appeal as they relied on in the Court below; and (3.) whether the appellants were entitled under the circumstances hereinbefore set forth to accept the gross estimated rental as fixed by special sessions, so as to preclude the respondents from giving evidence that the true gross estimated rental was some higher figure.

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Ryde, K.C., and *H. Davey*, for the respondents. First, the appellants had no right of appeal to quarter sessions. Sect. 6 of the Parochial Assessments Act, 1836, gives the right of appeal to the person "impugning" the decision of the special sessions. The appellants were the successful parties at special sessions. They obtained a substantial reduction in both the gross and the rateable value, and the respondents were ordered to pay costs to them. There was no power to order the respondents to pay costs unless the appeal had been determined in the appellants' favour: see s. 4 of the Poor Relief Act, 1743. Where a decision is in favour of a party that party cannot be said to impugn the decision, even though he contends that the decision ought to have been still more in his favour. Sect. 6 provides that notice of appeal shall be given to the person "in whose favour" the decision of the special sessions "shall have been made." The decision of the special sessions was clearly not in favour of the respondents, and therefore that provision could not be complied with in this case. This shows that it was never intended by s. 6 to give a right of appeal to a person who has succeeded at special sessions though not to the full extent.

Secondly, the respondents were entitled to call evidence at quarter sessions to prove that the true gross rental was in excess of the sum fixed by the special sessions. Where there is an appeal from special sessions to quarter sessions the issue at quarter sessions is the same as at special sessions. The respondents do not contend that the gross rental figure in the rate-book should be altered, but that in order to ascertain the rateable value they should have been permitted to show what the true gross rental was.

Shortt, K.C., and *Latter*, for the appellants, were called upon to argue the second point only. The respondents not having appealed against the decision of the special sessions as to the gross estimated rental are bound by the figure fixed by the special sessions: *Horton & Son* v. *Walsall Assessment Committee* (1); *Hendon Paper Works Co.* v. *Sunderland Assessment Committee*. (2) The appellants, by withdrawing so much of their appeal as related to the gross rental, admitted that the figure fixed by the special sessions was not too high. The respondents were in no way prejudiced, because as they had not appealed they must be taken to have admitted that

(1) [1898] 2 Q. B. 237. (2) [1915] 1 K. B. 763.

it was not too low. The authorities above referred to show that where there is no appeal against the gross rental the only matter to be ascertained in order to arrive at the rateable value is the amount of the statutable deductions. The recorder has found as a fact on the evidence that that amount had been agreed upon by the parties, and therefore it only remained to deduct that amount from the gross rental. [*Reg.* v. *London Justices* (1) and *Rex* v. *Inhabitants of Bromyard* (2) were also cited.]

Ryde, K.C., in reply. In *Horton & Son* v. *Walsall Assessment Committee* (3) and *Hendon Paper Works Co.* v. *Sunderland Assessment Committee* (4) the appeal was direct to quarter sessions, and it was held that the rating authority having itself fixed the amount of the gross estimated rental appearing in the rate-book was bound by it and was not entitled to call evidence to show that it was too low. In the present case the amount of the gross estimated rental has been determined, not by the rating authority, but by the special sessions. The figure in the rate-book is initialled by the justices' clerk, not by the respondents. There is therefore no reason why the respondents should be precluded from showing what is the true gross rental in order that the rateable value may be correctly arrived at. This view is supported by the last proviso to s. 7 of the Act of 1836. With regard to the point that the respondents did not appeal against the decision of the special sessions, there was no necessity for them to do so, because the appellants were appealing against the decision as to both the gross and the rateable values, and the respondents ought not to be allowed to be prejudiced, as they undoubtedly have been, by the appellants' subsequent withdrawal of their appeal against the decision as to the gross value.

Cur. adv. vult.

Feb. 15. The following written judgments were delivered :—

VISCOUNT READING C.J. John Fowler & Co. (Leeds), Limited, are the owners and the occupiers of certain premises, and were assessed to the poor rate by the assessment committee at 14,740*l.* as the gross estimated rental and 6850*l.* as the rateable value. They

(1) [1897] 1 Q. B. 433.
(2) (1828) 8 B. & C. 240.
(3) [1898] 2 Q. B. 237.
(4) [1915] 1 K. B. 763.

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appealed to the special sessions, and at the hearing on February 3, 1916, sought to establish that 7380*l.* was the gross estimated rental and 4060*l.* the rateable value, whilst the assessment committee, for the purpose of justifying their figures in the rate-book, contended that 17,053*l.* was the gross estimated rental and 9163*l.* the rateable value. The special sessions decided that the gross estimated rental should be reduced from 14,740*l.* to 11,800*l.* and the rateable value from 6850*l.* to 6300*l.*, and they ordered the assessment committee to pay 100*l.* costs to the appellants. Immediately upon the judgment being given, the appellants intimated that they were dissatisfied with the decision and intended to appeal. Upon the application of the assessment committee the rate-book was thereupon altered by the magistrates in accordance with their finding.

On February 16, 1916, the appellants gave notice of appeal to quarter sessions. Of the four grounds set forth in the notice of appeal only the first and second are now material. They are in the following terms: "(1.) That the gross value of the said hereditaments arrived at in the said decision is excessive, and not in accordance with the statutes in that case made and provided. (2.) That the rateable value of the said hereditaments arrived at in the said decision is excessive and not in accordance with the statutes in that case made and provided."

On March 6, 1916, the appellants gave notice by letter to the assessment committee that they did not propose to proceed with the first ground of the notice of appeal, and that they accepted the gross estimated rental as fixed by special sessions, namely, 11,800*l.* They contended that on the basis of assessment laid down by special sessions they were entitled to deduct from the gross estimated rental a sum representing the cost of repairs, renewals, and insurance, and not merely an estimated percentage on the whole, as had been contended by them at the special sessions. On April 11, 1916, a verbal agreement was made between the parties for the purpose of the appeal to quarter sessions that the statutable deductions should be taken at the sum of 7890*l.* By subtracting the agreed sum from the gross estimated rental the rateable value is reduced from 6300*l.* to 3910*l.* (a rateable value lower than that originally estimated by the appellants), and the

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appellants claimed that the rateable value should be fixed by the Court of quarter sessions at this reduced figure of 3910*l.* The assessment committee raised the preliminary objection that the appellants could not be heard on appeal, on the ground that they were the persons in whose favour the decision had been made, and that, by virtue of s. 6 of the Parochial Assessments Act, 1836, which gives the right of appeal from the decision of special sessions to quarter sessions, only such persons could appeal who had failed to obtain any relief from the special sessions. The Recorder decided against this preliminary objection, and held that the appellants had a right of appeal notwithstanding that they had succeeded upon part of the subject-matter of their appeal. The assessment committee thereupon sought to give in evidence that the gross estimated rental should have been fixed at a higher sum in order to arrive at the rateable value. Their purpose was to deduct the 7890*l.* from a higher figure than 11,800*l.* It is to be observed that no notice of appeal to increase the gross estimated rental or otherwise to vary the decision of the special sessions had been given by the assessment committee, and that consequently quarter sessions could not alter the sum of 11,800*l.* at which the gross estimated rental stood in the rate-book. It was admitted at the bar that the figure of 11,800*l.* could not be changed, whatever the result of the evidence might be. It was, however, contended before the learned recorder, and subsequently before this Court, that evidence on behalf of the assessment committee of an increased value of the gross estimated rental was admissible on the hearing of the appeal in order to arrive at a rateable value exceeding 3910*l.* when deducting the agreed amount of 7890*l.* from the gross estimated rental. When the agreement was made as to the figure of 7890*l.* both parties were aware of their respective contentions. The appellants knew that the assessment committee would seek to give evidence of an increased gross estimated rental; the assessment committee knew that the appellants would seek to exclude it, and would contend that the subtraction of the agreed figure from the 11,800*l.* was the only means of arriving at the rateable value. These facts appear from the shorthand note of the hearing, and are the explanation of the finding of fact in the last paragraph of the case. The learned Recorder decided against the assessment committee, and

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accordingly he reduced the rateable value to 3190*l.*, and at the request of the assessment committee stated a case to this Court.

Upon the preliminary objection I agree with the learned Recorder's judgment. The important words in s. 6 in this connection are "which decision shall be binding and conclusive on the parties, unless the person or persons impugning such decision shall within fourteen days after the same shall have been made cause notice to be given in writing of his, her, or their intention of appealing against such decision, and of the matter or cause of such appeal, to the person or persons in whose favour such decision shall have been made." In my judgment the person "impugning such decision" means the party aggrieved by the decision who wishes to vary or modify it in his favour. The words "the person in whose favour such decision shall have been made" and to whom the prescribed notice must be given are not words intended to limit the right of appeal to a person who has wholly failed in the appeal to special sessions, but are words intended to describe the person to whom the notice must be given. The language of the statute is not appropriate to restrict the right of appeal within so narrow a compass as is contended by the assessment committee, but is appropriate to indicate the person to whom notice must be given.

Upon the second point we were pressed by Mr. Ryde with the prejudice caused to his clients by the withdrawal of the first ground of appeal on March 6, 1916, when the time for the giving of notice of appeal had expired, and when consequently they were debarred from appealing. I agree with him that the appellants ought not to be allowed upon the hearing of the appeal to take advantage of their notice of withdrawal by letter of the first ground of appeal and could not do so without the leave of the Court, and that the position of the assessment committee ought not to be prejudiced by this action of the appellants. I shall deal with the case as if upon the hearing of the appeal the notice of appeal stood as given on February 16, 1916. I cannot, however, accept the contention of the assessment committee that evidence of a higher gross estimated rental was admissible to enable a higher rateable value to be arrived at. The application to special sessions is to hear and determine objections to a rate "on the ground of inequality, unfairness and incorrectness in the valuation of any hereditament included therein,"

and does not extend to the objection that the person is not liable to be rated at all by the particular rating authority. From special sessions there is an appeal, as already shown, under s. 6 of the Parochial Assessments Act, 1836, to quarter sessions, but notice must be given "of the matter or cause of such appeal." In this case the matter or cause of appeal is set forth in the four grounds stated in the notice of appeal by the appellants. No other question was before quarter sessions, inasmuch as no appeal had been lodged by the assessment committee against the value fixed for the gross estimated rental. If the appellants had persisted in contending on the appeal that the gross value of the hereditaments arrived at in the decision of special sessions was excessive, it would have been open to the assessment committee to give evidence placing it at a higher value, not for the purpose of increasing the value of the gross estimated rental in the rate-book, but only in order to maintain it and show that it was not excessive. In my opinion this is the sole purpose for which such evidence could be admitted. If this evidence had been given and accepted, the tribunal could nevertheless not have altered the figure at which the gross estimated rental stood in the rate-book. In my judgment it follows that if, as is admitted, the 11,800*l.* could not be altered in the rate-book, and if the figure 7890*l.* represented the agreed statutable deductions, the rateable value must be the result of the subtraction of the one figure from the other, namely, 3910*l.*, and could not be increased by arriving notionally at a higher figure as the gross estimated rental than that fixed in the rate-book.

It was argued that the proviso at the end of s. 7 of the Act of 1836, to the effect that no order of the justices in special sessions should be of any force pending an appeal to quarter sessions, tended to show that the parties began de novo before quarter sessions, and that the assessment committee could therefore give evidence of a higher gross value. These words have only the effect of suspending the operation of the order until the appeal.

Horton & Son v. *Walsall Assessment Committee* (1) (approved and followed by the Court of Appeal in *Hendon Paper Works Co.* v. *Sunderland Assessment Committee* (2)) is an authority which has a bearing upon the present case, although it is not directly in point,

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because in the present case the gross value had been fixed by the special sessions, and not by the rating authority, and was lower than that claimed by the rating authority. Nevertheless, much of the reasoning of the judgments in that case applies, and more particularly the passage in the judgment of Wills J. (1): "Therefore that figure in the rate-book stands, and it would be wrong to say that the magistrates ought to embark upon an inquiry, which might lead to a second figure, namely, the net rateable value, being altered in such a way that the statutory relations between these two figures of gross and net would be violated. Whatever the quarter sessions may do, they must see that the proper deductions are made, and bring the net rateable value into harmonious relation with the initial figure." If the assessment committee succeeded in this appeal, the net rateable value would not be in harmonious relation with the gross estimated rental, for the agreed reduction of 7890*l.* from the 11,800*l.* gross value in the rate-book could not give a figure in excess of 3910*l.* It would lead to a curious result if this Court decided that the Court of quarter sessions might assume a higher figure as representing the gross value than that appearing in the rate-book, which stands and cannot be altered, and might subtract the 7890*l.* from the higher figure in order to arrive at the rateable value. The rateable value must by law be the result of making the proper deductions from the gross value, which must be taken in this case as 11,800*l.* For these reasons I hold that the second point taken by the assessment committee also fails.

It follows, in my judgment, that the decision of the learned Recorder that the rateable value is 3910*l.* is right, and that the appeal must be dismissed with costs.

RIDLEY J. This was a case stated by the Recorder of Leeds upon an appeal against a decision of special sessions on an appeal made against a poor rate by John Fowler & Co. (Leeds), Limited, in respect of their engineering works. The assessment committee had valued the works at a gross rental of 14,740*l.* and a rateable value of 6850*l.*; and at the special sessions it had been contended by the appellants that the proper figures were for the gross rental

(1) [1898] 2 Q. B. 243.

7380*l.* and for the net rateable value 4060*l.* respectively. The decision at special sessions was to reduce the gross rental to 11,800*l.* and the net rateable figure to 6300*l.*, and that the respondents should pay to the appellants 100*l.* by way of costs. Notice of appeal was at once given by the appellants, and the case came in due time before the Recorder of Leeds at quarter sessions. In their notice of appeal the appellants complained, amongst other things, that they were over-rated in respect of both the gross rental and the rateable value; but on March 6 they gave the respondents notice that they did not propose to proceed with their appeal against the gross rental, and that they accepted the figure found by the special sessions. The other grounds of appeal relied upon need not now be given. On the part of the respondents no notice of appeal was given against the decision arrived at by the special sessions. It was proved by evidence given before the Recorder that about a week before the hearing at quarter sessions the parties had agreed that the statutable deductions should be taken at the figure of 7890*l.* At the quarter sessions a preliminary point was taken for the respondents that the appeal would not lie, under the provisions of the Parochial Assessments Act, 1836, because the appellants were not "impugning" the decision, nor could they give notice of appeal to the respondents as persons "in whose favour" the decision had been made. It is true that the decision of the special sessions was not wholly against the appellants nor wholly in favour of the assessment committee, the figures arrived at being higher than those of one side and lower than those of the other. But if this contention for the respondents were upheld, it would follow that the statute gives an appeal only in case of a complete failure by the ratepayer to alter the figures of the assessment committee, whereas the ratepayer who gets some reduction but claims a further one must be held to "impugn" the decision quite as much as the ratepayer who gets none; and, on the other hand, if there is any reduction at all the decision is not wholly in favour of the assessment committee. I think the decision of the Recorder against this contention was right and must be upheld.

The other question stated for our decision arises as follows: If the figure of 11,800*l.* for the gross rental arrived at by the special

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sessions is to stand, and the amount for statutable deductions is to be taken as agreed at 7890*l.*, the rateable value must be 3910*l.*, as decided by the recorder. But it was contended for the respondents that on such an appeal the issues must be the same as at the special sessions, and that they could at quarter sessions rely on the same points as in the Court below; and therefore it was open to them to give evidence raising the figures of the gross rental. No doubt, unless they could do so, and if the gross rental was to be taken at 11,800*l.* and the deductions at 7890*l.*, the rateable value must be 3910*l.* by a mere deduction sum; the figures in the rate-book must be so entered at quarter sessions, and there was nothing to try. But I think that the issues were not the same as at the special sessions, and that if the rating authority wished to raise the figure for the gross rental they were bound to appeal and to give notice accordingly, which they did not do. The decision was binding on them unless they impugned the decision and gave notice accordingly as the statute directs. If the appellants had not withdrawn their notice of appeal against the gross rental, then it would have been open to the rating authority to give evidence that the figure should have been higher, but only for the purpose of contending that it should be at least so much; in other words, they could not have claimed to alter the figure in the rate-book. That the appellants could withdraw their notice and accept the figure seems to me to be beyond question; and now that they have done so, still less can the gross rental figure be subject to alteration at quarter sessions.

This case differs from *Hendon Paper Works Co.* v. *Sunderland Assessment Committee* (1) in that it is an appeal from the special sessions, and therefore must be determined by the terms of the statute relating thereto; whereas in the *Hendon Case* (1) the appeal was direct to quarter sessions. It was there determined that it is not open to the rating authority on appeal to quarter sessions to tender evidence questioning the figure which they have themselves entered in the rate-book; and it is certainly not in conflict with our decision on the present occasion.

I think that the decision of the Recorder was right, and that it must stand accordingly.

(1) [1915] 1 K. B. 763.

LUSH J. The first question that is raised in the case stated by the learned Recorder is whether Fowler & Co. (Leeds), Limited, had under the circumstances a right of appeal from special sessions to quarter sessions. The answer to it depends upon the terms of s. 6 of the Parochial Assessments Act, 1836. That section provides that the decision of the special sessions shall be binding "unless the person or persons impugning such decision shall within fourteen days . . . . cause notice to be given in writing of his, her, or their intention of appealing against such decision, and of the matter or cause of such appeal, to the person or persons in whose favour such decision shall have been made." It was contended by Mr. Ryde that there was no right of appeal in this case because, he said, the rate which had been made, and against which the appellants appealed to the special sessions, had been substantially reduced. The decision, therefore, said Mr. Ryde, was in favour of the appellants, not in favour of the assessment committee. He contended that the appellants could only appeal if the rate had been confirmed. The learned Recorder overruled that contention, and in my opinion he was quite right in doing so. I think that we should be putting far too narrow a construction on the Act if we adopted Mr. Ryde's contention. The appellants failed in their contention as to the amount at which the premises ought to be assessed, and as to that contention they were the persons impugning the decision, and the assessment committee were the persons in whose favour it was made. I think that the terms of the section are clearly wide enough to cover an appeal against an inadequate reduction as well as an appeal against a refusal to make any reduction at all.

Two other questions are raised which it will be convenient to deal with together. The facts which give rise to them have already been stated in the judgments which have been delivered, and it is not necessary to repeat them. The substantial question is whether on the hearing of the appeal the assessment committee were entitled to raise the same issues as had been raised before the special sessions and call evidence to prove that the true gross value of the premises was more than 11,800*l.*, the sum fixed by that Court, and, having proved it, to have the statutable deductions for repairs, &c., which had been agreed at 7890*l.*, subtracted from the sum so proved, so as to arrive at the rateable value. The

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appellants contended that, as they had withdrawn so much of their appeal as related to the gross value and accepted 11,800*l.* as the true gross value, the assessment committee, who had not appealed against the decision of special sessions, could not challenge its correctness and were bound to treat 11,800*l.* as the gross value for all purposes. If this view was right, all that remained to be done was to subtract from it the agreed sum of 7890*l.*, a sum which had been agreed when the position and the contentions on both sides were well known to the parties. The learned Recorder decided in favour of the appellants, subject to a case. Now, the contention of the appellants appears to me to involve this proposition, namely, that they were entitled to withdraw part of their appeal and confine it to the rateable value, and that it was this withdrawal that precluded the assessment committee from challenging the correctness of the decision of the special sessions both as to the gross and rateable value. If so, I should certainly not agree with such a contention. They were bound, I think, so far as the rights of the respondents, the assessment committee, were concerned, to proceed with the appeal of which they had given notice (pursuant to s. 6 of the Act), and which was the subject of the recognizances entered into by their director on their behalf, and if the assessment committee would have been entitled, had the whole appeal been proceeded with, to prove that the true gross value exceeded 11,800*l.* and to have the 7890*l.* deducted from the true figure, I think that the appellants could not have abandoned part of the appeal and thereby have deprived the assessment committee of that right. But it seems to me to be clear that the position of the assessment committee was not affected by the withdrawal, and that if the whole appeal had been proceeded with they could not have done what they claim. They could no doubt have given evidence that 11,800*l.* was too low a figure, and that the real gross value was a larger sum, but they could only have done this for the purpose of opposing any reduction of the 11,800*l.* It was admitted by Mr. Ryde that they could not have asked to have that sum increased because they had not appealed against the decision of the special sessions. The gross value in the rate-book, and the real gross value so far as gross value itself is concerned, would still be 11,800*l.* That, therefore, must be the sum from which the statutable deductions

must be subtracted in order to arrive at the rateable value. If this were not so, there need be no real relation between gross and rateable value. If Mr. Ryde's contention were right, one could conceive of a case in which the rateable value of the premises assessed exceeded the gross value, which is manifestly impossible. I think that in the result the decision of the learned Recorder was right. I would add that the proviso to s. 7 of the Act to which Mr. Ryde referred has in my opinion no bearing on the questions we have had to decide. It only provides for a stay of proceedings pending an appeal.

I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Peter Thomas & Clark, for Simpson & Curtis, Leeds.*

Solicitors for respondents: *W. J. & E. H. Tremellen, for Emsley & Son, Leeds.*

(1) Parochial Assessments Act, 1836 (6 & 7 Will. 4, c. 96), s. 6: "The justices acting in and for every petty sessions division shall four times at least in every year hold a special sessions for hearing appeals against the rates of the several parishes within their respective divisions, ... ; and such special sessions shall and may be adjourned from time to time by the justices there present, as they may think fit; and at such special or adjourned sessions the justices there present shall hear and determine all objections to any such rate on the ground of inequality, unfairness, or incorrectness in the valuation of any hereditaments included therein, which decision shall be binding and conclusive on the parties, unless the person or persons impugning such decision shall within fourteen days after the same shall have been made cause notice to be given in writing of his, her, or their intention of appealing against such decision, and of the matter or cause of such appeal, to the person or persons in whose favour such decision shall have been made, and within five days after giving such notice shall enter into a recognizance before some justice of the peace, with sufficient securities, conditioned to try such appeal at the then next general sessions or quarter sessions of the peace which shall first happen, and to abide the order of and pay such costs as shall be awarded by the justices at such quarter sessions, or any adjournment thereof; . . . ."

Sect. 7: "The justices present at any such special or adjourned session shall for the aforesaid purpose have all the powers of amending or quashing any such rate so objected to of any parish or other district within their division, and likewise of awarding costs to be paid by or to

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any of the parties, and of recovering such costs, which any Court of quarter sessions of the peace has upon appeals from any such rate, except as herein excepted: Provided . . . . that nothing in this Act contained shall be construed to deprive any person or persons of the right to appeal against any rate to any Court of general or quarter sessions: Provided also, that no order of the said justices in special session shall be of any force pending any appeal touching the same subject-matter to the Court of general or quarter sessions of the peace having jurisdiction to try such appeal, or in opposition to the order of any such Court upon such appeal."

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Feb. 5, 12, 13, 14, 20.

SELBY *v.* WHITBREAD & CO.

Metropolis—Building—London Building Act, 1894 (57 *&* 58 *Vict. c. ccxiii.)—Party Wall Notice—Transfer of Site by Building Owner —Effect of, on his statutory Obligations—Easement of Support to Building by Building—How affected by Building Notice.*

The plaintiffs and the defendants were the owners of two adjoining houses in London. The houses were very old and had been built together so as to be mutually dependent upon one another for support. They were separated by a party wall. The defendants, having resolved to rebuild their house, served upon the plaintiffs a party wall notice under the London Building Act, 1894, and the parties, in accordance with the provisions of s. 91 of that Act, appointed their respective surveyors. The house was pulled down and rebuilt 13 feet further back from the street, and the defendants conveyed the vacant 13 feet strip to the County Council, who dedicated it to the public. The effect of setting the house back was that the party wall was left exposed to a depth of 13 feet and rendered unsafe by the withdrawal of the support of the defendants' house. Subsequently to the dedication the surveyors made an award ordering the defendants to erect on the edge of the strip so dedicated a pier for the support of the exposed portion of the party wall. In an action brought to enforce the award, and also to recover damages at common law for the withdrawal of the support afforded by the building pulled down:—

Held: (1.) That the defendants, having once served a party wall notice under the Act, could not by transferring the site to the County Council get rid of their obligations as building owners, but were bound, notwithstanding the transfer, to carry out the award which was subsequently made.

(2.) That the award, in ordering the building of a pier on the vacant strip of land, was not bad, either by reason of the fact that the site had been dedicated to the public as a highway, or that,

subject to the rights of the public, it was the property of third persons; for the public by the dedication, and the County Council by the conveyance, took subject to the statutory rights of the plaintiffs under the London Building Act.

(3.) That an easement of support to buildings by buildings may be acquired by prescription, and that such an easement had in fact been acquired by the plaintiffs; but that the statutory rights of protection which the plaintiffs as adjoining owners acquired under the Act upon the service of the party wall notice by the defendants were inconsistent with and superseded their common law right of support from the defendants' building, and that the claim for damages at common law could consequently not be maintained.

TRIAL of action by McCardie J. without a jury.

The action was brought to enforce an award made under the London Building Act, 1894, and also to recover damages at common law for the withdrawal of support afforded to the plaintiffs' house by the defendants' house.

Macmorran, K.C., and *A. Cairns*, for the plaintiffs.

Ernest Wild, K.C., and *G. W. Ricketts*, for the defendants.

The facts and arguments are fully set out in the judgment.

Feb. 20. MCCARDIE J. read the following judgment:—This is an action brought by the executors of Stanley Harris, deceased, against the defendant company to enforce an award dated January 7, 1916. That award was asserted by the plaintiffs to be duly made under the provisions of the London Building Act, 1894. The plaintiffs also claimed damages at common law for the alleged wrongful withdrawal by the defendants of support yielded by the buildings of the defendants to the buildings of the said deceased. The case is complicated. It raises many important points. I proceed to state the undisputed facts.

Mr. Harris died in 1915. The plaintiffs have succeeded to his rights. In this judgment I shall throughout describe the plaintiffs as the owners of the buildings for the protection of which this action is brought. The plaintiffs owned No. 11, Royal Mint Street, in the county of London. The defendants owned the adjoining premises, No. 12. They were owners within ss. 87 to 91 of the London Building Act, 1894. Both buildings were old. They had

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been built together about 200 years ago. A party wall separated the two hereditaments. The wall was built partly on the land of the plaintiffs and partly on the land of the defendants. Each house abutted on Royal Mint Street. The front wall of both buildings was a continuous structure. The roof of the buildings was also a continuous structure. At all material times the plaintiffs' premises were occupied by a caterer and the defendants' premises were duly licensed for the sale of liquor. Those premises were known as the "Rising Sun." In April, 1914, the defendants desired to reconstruct their premises. They accordingly served upon the plaintiffs a party wall notice under s. 90 of the Act. The notice was dated April 29, 1914. By the notice the defendants indicated the nature of the work they proposed to effect in connection with the party wall. The work was substantial. They appointed Mr. Dixon as their surveyor to superintend the work and to settle matters of difference. On May 12, 1914, the plaintiffs appointed Mr. Eason as their surveyor pursuant to s. 91 of the said Act of 1894. On May 21, 1914, Mr. Woodward was duly appointed as the third and wholly independent surveyor. Questions arose as to the works proposed by the defendants and as to the matters required for the protection of the plaintiffs. Mr. Dixon and Mr. Eason accordingly met and discussed the points at issue. On February 22, 1915, they duly signed an award in pursuance of their powers under s. 91 of the said Act of 1894. Each side admits the validity of the award. The wording of the award is important. The language appearing on the plan incorporated with the award is equally important. It is upon the wording and effect of that award and plan that the defendants base one of their substantial contentions in this case. Clause 2 of the award is as follows: "That the building owners shall at their own expense take every precaution for the support of the building of the adjoining owner by providing all necessary temporary or permanent shoring or strutting or tie rods or other means as may be ordered by the district surveyor or mutually agreed, and hoard off or otherwise protect all parts of the adjoining owner's premises during the execution of the works with all necessary fans screens and other temporary protection to the reasonable satisfaction of the surveyor for the adjoining owner." Clause 7 is as follows: "That power is reserved to the above named

surveyors to make further awards as may be agreed between them in respect of any further matters in connection with the party structure." Before I consider the points which arise on the award it is desirable to state some of the other undisputed facts in the case. In 1913 a dangerous structure notice had been served on the defendants under the provisions of the London Building Act. The defendants thought it desirable to rebuild their premises. They prepared plans, and in April of 1914 they secured the approval of those plans from the justices sitting under the Licensing Act, 1910, subject to the setting back of the premises so as to secure a wider footpath along Royal Mint Street. The scheme of widening was consonant to the wishes of the local authority and the London County Council. On August 31, 1914, the defendants made an agreement with the London County Council with respect to such widening. In substance that agreement provided that the defendants should thereafter convey to the London County Council for the purposes of dedication to the public as a highway the land left open by the setting back of the defendants' premises. On April 9, 1915, the defendants executed a conveyance of the said land to the London County Council pursuant to the said agreement. The conveyance also provided for the complete indemnity of the defendants by the London County Council against all claims by the plaintiffs. Neither the said agreement nor the said conveyance was actually disclosed to the plaintiffs, but prior to the award of February, 1915, the plaintiffs were aware of the widening scheme, and the plan attached to the award clearly shows that the new premises of the "Rising Sun" would be set back about 13 feet. In March, 1915, the "Rising Sun" suffered the first blows of demolition. The work of destruction was completed in the same month. Building operations thereupon commenced, and in August, 1915, the licensed premises were again opened to the public. The new building was set back about 13 feet. A large space of the party wall (which I shall call the flank wall) was exposed as a result of the removal of the old structure of the defendants. The new front of the defendants' premises abutted upon the party wall at the said distance of 13 feet from the original line of frontage. From about August, 1915, the public were free to traverse the space in front of the new "Rising Sun" premises. The pavement

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was completed in or about October of the same year. I infer that dedication to the public took place in the autumn of 1915. On August 26, 1915, Mr. Eason (the plaintiffs' surveyor) wrote to Mr. Dixon (the defendants' surveyor) asking what he proposed to do to secure the plaintiffs' premises against the risks arising through the removal of the support previously given by the defendants' building. From this point onwards the facts and inferences in the case are in dispute. It will suffice for the moment to say that the defendants disclaimed liability and asserted that their liability as building owners had been transferred to the London County Council. They refused to take part in any further proceedings between the plaintiffs and themselves under the London Building Act. Thereupon Mr. Eason and Mr. Woodward (the third surveyor) entered into communication. They inspected the premises together. As a result there sprang into existence the award of January 7, 1916, signed by Mr. Eason and Mr. Woodward. That award is the primary basis of the plaintiffs' claim. It must be read in conjunction with the award of February 22, 1915. The arguments upon the two awards have been presented with great fulness and ability. The points raised are of great difficulty and importance. The substance of the award of January, 1916, was as follows: (*a*) that the defendants should erect a pier of a substantial character to the said flank wall in order to give support to the plaintiffs' structure; that the defendants should perform three separate minor works, namely, (*b*) to the roof, (*c*) to the verges, (*d*) to the parapet; that the said works should be done at the sole cost of the defendants; and that the defendants should pay to the plaintiffs a total sum of 27*l.* 6*s.* for the costs and fees in connection with the said award. Upon the above facts and documents the defendants raise their principal contentions, and I take them separately.

First, the defendants contended that upon the execution of the conveyance of April, 1915, they wholly divested themselves of any liability to the plaintiffs inasmuch as they ceased (so it was argued) to be building owners and their obligations therefore passed ipso facto to the London County Council. The point is one of great importance. If correct, it would seriously diminish the rights of adjoining owners, and it must inevitably lead to uncertainty and

confusion in adjusting rights under the London Building Act. To uphold such a contention would enable a prosperous building owner, upon discovering that his obligations were onerous beyond expectation, to transfer his premises to a man of straw and thereby deprive an adjoining owner of any remedy against the person who had initiated the building operations. I have read with care the London Building Act. There is no section which expressly provides for such a transfer of liability, nor do I find any section which so provides by implication. As any such transfer might inflict grave hardship upon an adjoining owner, I should require a clear provision of the statute before holding that such a transmission of liability could take place against the will, and perchance without the knowledge, of the adjoining owner. But the defendants argued that I was bound by authority to give effect to their contention. They relied upon *Mason* v. *Fulham Corporation.* (1) That decision requires attention. The judgments of Phillimore J. and Bucknill J. were given after full argument. If the decision applies to the facts of the present case, I must follow it in spite of the doubt I may feel as to the correctness of the views expressed by the learned judges. The decision turned upon ss. 95 and 99 of the Act. The plaintiff and the commissioners of the Fulham Library had at one time been respectively building and adjoining owners. The plaintiff rebuilt a party wall in 1895 upon the terms that the adjoining owners should have the right at any time thereafter to use the party wall upon payment of one moiety of the cost of its erection. In 1896 the plaintiff conveyed his premises to one Slater. In 1899 Slater conveyed the premises to Sir Edward Galsworthy. In 1908 the defendants succeeded to the property of the said commissioners. They desired to use the said party wall, and they accordingly served a notice on Sir Edward Galsworthy under the Act of 1894. A difference arose and surveyors were appointed. An award under such Act of 1894 directed that the defendants should pay 55*l.* 14*s.* 6*d.* to Sir E. Galsworthy. They duly paid that sum to him. The plaintiffs then claimed it from the defendants. Phillimore J. and Bucknill J. held that the claim failed inasmuch as the plaintiff had assigned away in 1896 the whole of his premises, including the party wall in question (which party wall had been vested in the

(1) [1910] 1 K. B. 631.

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plaintiff in 1895 by virtue of s. 99 of the Act), and that by such assignment the plaintiff must be taken to have assigned also his contingent right to the said sum. In my opinion *Mason* v. *Fulham Corporation* (1) turned upon the specific wording of ss. 95 and 99 of the Act of 1894 as applied to certain specific facts. It has no application to the present case. The assignment of a chose in action such as a debt differs fundamentally from the assignment of an obligation. In *Mason* v. *Fulham Corporation* (1) there was a transfer of a mere debt. No question arose as to the transfer of a liability. The particular words of the Act upon which the decision turned differ in a striking fashion from the provisions of ss. 87 to 94 so far as they impose the obligations which are relevant to the present dispute. Sect. 94 is not without importance. It provides in substance that an adjoining owner may require the building owner before he commences work to give adequate security for all expenses, costs, and compensation which may become payable by him to such adjoining owner. It seems to me that that section contemplates that the person who serves the notice under s. 90 shall be and remain liable for all the results which follow from such notice. During the arguments I asked the learned counsel for the defendants to state the procedure by which the plaintiffs could have enforced against the London County Council the obligations alleged to have been transferred, including presumably the obligations under the award of February 22, 1915. No satisfactory answer was given. The conveyance of April, 1915, took place after the demolition of the defendants' premises and before the erection of the new buildings, and any resultant transfer of obligations would be attended with unceasing confusion as to legal rights and duties and the possibility of conflicting or overlapping jurisdictions between several sets of arbitrators. Sect. 91 of the Act provides that the arbitrators appointed after service of the notice shall settle from time to time all matters in dispute. Their jurisdiction is, I think, continuous and exclusive, subject to the rights of appeal given by s. 91. It remains unimpaired until the final adjustment of all questions in difference between the building owners who gave the notice and the adjoining owner who received the notice, and until the operations involved in the notice are concluded. I therefore

(1) [1910] 1 K. B. 631.

hold that no transfer of obligations took place whereby the defendants were freed from their appropriate liability to the plaintiffs.

Secondly: The defendants contended that the second award was void inasmuch as it directed the performance of matters with respect to which the arbitrators under s. 91 had exhausted their jurisdiction by the first award. This point involves the construction of the first award. I have already stated the material wording of clause 2 of such award. The defendants assert that that clause, when read in conjunction with the plan, provided fully and finally for all such works as might be needed for the protection and support of the plaintiffs' walls and structure. I find as a fact that all things actually ordered by the district surveyor had been done prior to the second award. If, therefore, the second clause of the first award is exhaustive of the matters to be done for the protection and support of the plaintiffs' walls and structure, it would follow that the first clause of the second award is beyond the jurisdiction of the arbitrators who made it. But in my opinion clause 2 of the first award does not bear the meaning contended for by the defendants. The words are not clear, and I have felt doubt as to the proper construction thereof, but I have come to the conclusion that it directs two classes of acts to be performed—namely, (*a*) those acts which the district surveyor may direct to be done in pursuance of his statutory powers under the Act of 1894; and (*b*) such further acts as the parties or their surveyors may agree to be necessary for the temporary or permanent protection of the plaintiffs' walls and structure. In default of agreement with respect to the acts indicated in head (*b*) it would follow that further arbitration would be necessary. That contingency is amply provided for by clause 8 of the award. The words "from time to time" in s. 91 of the Act clearly contemplate that several awards may be made by the arbitrators. The words "at their own expense" in clause 2 seem to me to indicate that the matters directed by the district surveyor shall as of course be paid for by the defendants. Such matters would be a direct and inevitable result of the operations commenced by the defendants. But such matters are, I think, the minimum and not the maximum to which the plaintiffs were prima facie entitled. The primary function of the district surveyor, as he himself stated, is to safeguard the interests of the public. Incidentally only he may seek to protect

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the interests of the adjoining owner. His functions are indicated by s. 146 of the Act. But the primary function of the arbitrators is to safeguard the interests of the adjoining owner; although they must, of course, consider the rights and interests of the building owner and follow the provisions of the Act of 1894. I cannot think that clause 2 left it to the district surveyor to determine the whole of the works required for the protection of the plaintiffs. It was conceded by the defendants' counsel that the district surveyor was not bound to undertake such a function, and that it formed no part of his statutory duties. Moreover, such an interpretation of clause 2 would involve the conclusion that the arbitrators had wrongfully delegated to the district surveyor a function which it was their own duty to perform: see *Tomlin* v. *Fordwich Corporation*. (1) It is the duty of the district surveyor to guard against immediate danger, but it is the duty of the arbitrators to direct all such measures as shall protect the adjoining owners, not only from immediate danger, but from future risks which may reasonably result from the operations of the building owner. It was contended by Mr. Ricketts that the words "as mutually agreed" in clause 2 as well as the whole of the words in clause 8 were mere surplusage. I cannot take such a view. Fair effect must be given to the whole contents of the award. I agree that clause 2 is somewhat vague. But it must be remembered that the award was made in February, 1915, and the demolition did not begin until March, 1915. It is clear from Mr. Dixon's (the defendants' surveyor's) letter of January 7, 1915, that he realized fully the impossibility of ascertaining the full extent of future preventive measures required until the demolition was complete. The measure of precision desirable in an award must vary with the circumstances of the case. It is important to maintain the rights of arbitrators under the Act of 1894 to make interim awards, and it is desirable, I think, to construe awards without pedantic strictness or meticulous severity. I decide against the second contention of the defendants.

Thirdly: It was next contended by the defendants that the second award was bad because no "difference" had arisen between the parties prior thereto within s. 91 of the Act of 1894. A difference may exist as to a question of fact, or as to a question of law, or

(1) (1836) 5 Ad. & E. 147.

upon a mixed question of fact and law. No authority exists as to the meaning of the word "difference" in s. 91 of the Act, but reference may be usefully made on the point to *Midland Ry. Co.* v. *Loseby* (1), *London and North Western Ry. Co.* v. *Donellan* (2), and *Randegger* v. *Holmes.* (3) I agree that a difference must arise before the jurisdiction of arbitrators can be invoked under s. 91, but in my opinion it is clear that such difference had arisen in the present case. In August, 1915, the plaintiffs' surveyor thought and desired that the flank wall should be further supported. The defendants' surveyor did not agree with that view. He announced, moreover, that the defendants had no further interest in the matter. From time to time he repeated that statement with a varying degree of emphasis. He referred the plaintiffs to the London County Council. Mr. Hunt (an agent of the London County Council) took the matter up. He became aware of Mr. Eason's suggestions that further support should be afforded to the flank wall. He disagreed with Mr. Eason's view. He prepared a specification of further work. He submitted it to Mr. Eason. Mr. Eason deemed it to be clearly insufficient. He and Mr. Hunt differed on a vital point. Mr. Eason deemed that a pier was needed; Mr. Hunt thought that it was quite unnecessary. Both Mr. Hunt and Mr. Dixon have throughout the whole period from August, 1915, onward differed from the view of Mr. Eason with respect to the pier. The correspondence discloses clearly such difference of opinion. It was disclosed with equal clearness at the trial. As a result Mr. Eason communicated with Mr. Woodward (the independent surveyor). Mr. Dixon was requested to attend at Royal Mint Street to discuss the matter in dispute. He refused to do so. Under these circumstances I am clearly of opinion that a difference within s. 91 had arisen between the plaintiffs and defendants prior to the date of the second award. I may add the observation that I do not think it would be in conformity with the scheme of the Act of 1894 to give too rigid or confined a meaning to the word "difference" as used in such Act. Moreover, a difference is none the less a "difference" because the divergence of view as to law or fact has been indicated by phrases of courtesy rather than the language of vehemence.

(1) [1899] A. C. 133. (2) [1898] 2 Q. B. 7.
(3) (1866) L. R. 1 C. P. 679.

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Fourthly: It was next contended by the defendants that the second award was bad because it directed the performance of illegal acts—namely, (*a*) the creation of an obstruction upon a highway whereby the defendants might be exposed to prosecution under s. 199 of the Act of 1894 and s. 72 of the Highway Act, 1835; (*b*) the erection of a structure upon the land of a third person, namely, upon the land of the London County Council. The points are of great importance and difficulty. It is of course settled law that an award cannot direct the performance of impossible or illegal acts: see *Turner* v. *Swainson* (1); *Lewis* v. *Rossiter* (2); *Eastern Union Ry. Co.* v. *Eastern Counties Ry. Co.* (3); and Russell on Arbitration, 9th ed., pp. 250, 266. If the contention of the defendants be sound, it follows that a building owner can gravely impair the rights of the adjoining owner by the simple method of dedicating as a highway a part of the building owner's land, or by conveying a part thereof to a third person. If such method be valid, then arbitrators under the Act of 1894 could not effectively direct the performance of any work on the land of the building owner after such dedication or transfer. The point at issue is this: Do the public and do such third persons take subject to the rights of the adjoining owner under the Act of 1894? There is no direct authority on the point. With respect to the dedication of a highway, it is clear, I think, that the public take their privileges subject to certain classes of rights which may exist in third persons; for example, the public right may be subject to the market rights of third persons: see *Attorney-General* v. *Horner* (4); *Goldsmid* v. *Great Eastern Ry. Co.* (5); *Gingell, Son & Foskett* v. *Stepney Borough Council.* (6) So too the public may take subject to the rights of the occupiers of premises adjoining the highway to deposit goods upon the soil in front of their premises: *Morant* v. *Chamberlin.* (7) The authorities upon such points are collected in Pratt on Highways, 16th ed., pp. 20—21. The public also take their rights subject to existing erections and excavations: see *Fisher* v. *Prowse.* (8) In the present case, as already stated, the defendants gave their building

(1) (1836) 1 M. & W. 572.
(2) (1875) 44 L. J. (Ex.) 136.
(3) (1853) 2 E. & B. 530.
(4) (1885) 11 App. Cas. 66.
(5) (1883) 25 Ch. D. 511; (1884) 9 App. Cas. 927.
(6) [1908] 1 K. B. 115.
(7) (1861) 6 H. & N. 541.
(8) (1862) 2 B. & S. 770.

notice in 1914. Thereupon the rights of the plaintiffs sprang into being under the Act of 1894. Dedication did not take place until the autumn of 1915. At such date the rights of the plaintiffs were still, as I have held, subsisting. Did the public take subject to such rights? In my judgment the answer is, Yes. The rights of the plaintiffs were not merely equitable; they were statutory. I cannot think that they may be defeated in the manner suggested by the defendants. It is unnecessary to analyse in detail the Act of 1894. It is obvious that the various building and other operations falling within the Act may involve a substantial interference with highways. The public are subject to the inconvenience thereby caused. The public are mere volunteers, and in my opinion the dedication of the space of land in question must be deemed to be subject to such interference therewith as was properly necessitated by the exercise by the plaintiffs of their statutory rights under the Act of 1894. As to head (*b*), the position is more difficult to formulate. Prima facie it should not be open to the defendants to defeat the plaintiffs' rights by the easy process of a conveyance to third persons. The London County Council were purchasers for value of the piece of land in question. But they were well aware of the plaintiffs' rights. They were fully cognizant of the notice given by the defendants to the plaintiffs. The district surveyor had frequently visited the premises during the relevant period. The deed of April 9, 1915, indicates the full knowledge possessed by the London County Council. I hold that they took the land in question subject to the statutory rights of the plaintiffs under the Act of 1894. I should have come to such conclusion apart from the fact that the London County Council possessed the amplest notice at all material times of such rights. The London County Council were, I think, subject to such rights, both actual and potential, as sprang from the building notice given by their predecessors in title. The extent of such rights had not been defined in April, 1915; but postponement of definition does not involve either the destruction or the impairment of the plaintiffs' statutory privileges.

Fifthly: In view of my rulings as already stated, it is not necessary to deal at length with a further contention of the defendants, namely, that the award of January, 1916, is not severable, and that if any part thereof be void the whole award must be treated

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as bad. But I may say a few words on the point in the event of the case being taken to the Court of Appeal. In former days it was considered that an award void in part was void in toto. That doctrine has been modified, and I think the modern rule is that an award although void as to part may be good as to the remainder, provided the part which is bad can be separated with reasonable clearness from the part which is good: see the cases collected in Russell on Arbitration, 9th ed., pp. 216—218. If, however, the void part is inextricably connected with the other part, then the award will be void in toto: per Blackburn J. in *Duke of Buccleuch* v. *Metropolitan Board of Works* (1); and it is not seldom a matter of difficulty to sever the good from the bad: per Lord Denman in *Tomlin* v. *Fordwich Corporation*. (2) I think that the Court should approach an award with a desire to support rather than to destroy it. In the present case the award deals with the following distinct matters: (*a*) the pier to the flank wall; (*b*) the repairs to the roof; (*c*) the finishing of verges and barge boards; (*d*) the placing on the parapet of a stone coping. In my opinion heads (*b*), (*c*), and (*d*) are distinct from head (*a*). Even if head (*a*) be void, I think that heads (*b*), (*c*), and (*d*) are good and severable from (*a*). The award next deals with the question of costs and fees, and orders the defendants to pay the plaintiffs the total sum of 27*l.* 6*s.* If I had held that head (*a*) was void, would such ruling have compelled me to find that the direction as to costs was bad? The question is one of great doubt, and the difficulties of the Court are indicated rather than solved by such decisions as *Seccombe* v. *Babb* (3) and *In re Marshall and Dresser*. (4) Upon the whole I have come to the conclusion, though with great diffidence, that there is nothing to compel me to hold that the direction as to costs was dependent upon, or even necessarily connected with, head (*a*) of the award, and that, in view of the validity of heads (*b*), (*c*), and (*d*), I am entitled to decide, as I do, that the order as to costs would be valid even though it should be held that head (*a*) of the award be invalid. The point does not seem to have been discussed either by Walton J. or the Court of Appeal in the case of *In re Stone and Hastie*. (5)

(1) (1870) L. R. 5 Ex. 221, 229.
(2) 5 Ad. & E. 147, 152.
(3) (1840) 6 M. & W. 129.
(4) (1842) 3 Q. B. 878.
(5) [1903] 2 K. B. 463.

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Sixthly: It was next contended by the defendants that head (*a*) of the second award directed the performance of a work, namely, the erection of a pier, which was not in fact necessary for the protection of the plaintiffs' flank wall. Evidence was adduced upon the point. That evidence was not objected to by either side. It was admissible for other purposes if it bore directly upon the plaintiffs' claim for loss of common law support, and it was also relevant to the question of damages. But in my judgment such evidence could not be utilized for the purpose of challenging the decision of the arbitrators with respect to the necessity of a pier for the support of the plaintiffs' wall. The question was one of fact, and it involved expert knowledge. It fell most appropriately within the jurisdiction given to arbitrators by s. 91 of the Act of 1894. No appeal against the award was made to the county court by the defendants under sub-s. 2 of s. 91. The award was therefore conclusive as to the necessity for a pier to support the plaintiffs' wall. That result follows from the direct words of s. 91 itself. I agree that an award is in no way conclusive if it is in excess of the jurisdiction of the arbitrators: see *In re Stone and Hastie.* (1) But if the matters dealt with are not beyond the powers of the arbitrators, then the award cannot be challenged on such a point as that now arising save by appeal as indicated in s. 91. It may, however, be a matter of convenience to state my own conclusions of fact with respect to the necessity of the pier as a support to the flank wall. The principal witnesses for the defendants were Mr. Tanner (the district surveyor), Mr. Hunt (the valuer for the London County Council), Mr. Dixon (the surveyor for the defendants), and Mr. Cheston. The other witnesses were of less importance. I have considered with care the whole of the testimony given on behalf of the defendants. I need not analyse it in detail. It will be sufficient for me to say that I was not impressed with the evidence of Mr. Tanner or Mr. Hunt, and that in my view Mr. Dixon had substantially yielded his judgment to the judgment of the London County Council. I have paid to the evidence of Mr. Cheston the attention which is required by his position and his experience. He differs from the view of Mr. Woodward, but I come to the conclusion that Mr. Woodward was right in the opinion he formed as

(1) [1903] 2 K. B. 463.

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to the need for a pier to support the flank wall. He had been appointed as independent arbitrator. His bona fides was, of course, unchallenged. His ability and experience were conceded in express terms by the defendants' counsel. I agree with his view. It was supported by the evidence of Mr. Eason, the plaintiffs' surveyor. It was supported also by the independent testimony of Mr. Martin, a gentleman of fifty years' experience, and a past president of the Surveyors' Institute. It is worthy of notice that the defendants expressly admitted in the course of the case that the flank wall was a dangerous structure in September, 1915. Such admission was inevitable in view of the fact that on September 6, 1915, the London County Council had actually served a dangerous structure notice on the plaintiffs. The danger feared must, I think, have been the apprehended fall of the flank wall. No other reason for the notice could be suggested by counsel for the defendants. The official who originated the notice was apparently unaware that the London County Council had agreed to indemnify the defendants. At the date of the notice the defendants' building, the new "Rising Sun," had been completed. The building was not thereafter added to. The only thing thereafter done to meet the danger was that the plaintiffs' front wall was bonded in to the flank wall. It is clear that that operation lessened to some extent the danger of fall, but I am satisfied that it did not remove the danger, and I think that Mr. Woodward was amply justified in his conclusion that a pier was required. I may also point out that at or about the beginning of September, 1915, Mr. Tanner himself suggested to Mr. Eason that it would be desirable to strengthen the flank wall by means of buttresses. He did not employ (he told me) the word "pier"; but I see no substantial difference between a pier and a buttress. I do not think that the bonding which took place in the late autumn of 1915 was in any way a satisfactory substitute for the buttresses which Mr. Tanner thought desirable at a somewhat earlier date. The exact point at which Mr. Tanner and Mr. Hunt became aware that the London County Council had agreed to indemnify the defendants does not clearly appear. But I infer that they were so aware on or before September 14, 1915, when the London County Council withdrew the dangerous structure notice. Such

fact is not without importance in considering the circumstances of the case.

Seventhly: Upon the minor heads of the second award I find as follows:—First (under head (*b*)), that the roof had not been repaired in accordance with such award: I assess the damages (if such be the true remedy) at 5*l*. Secondly (under head (*c*)), that the verges and barge boards have not been properly finished off: I assess the damages (if such be the true remedy) at 2*l*. Thirdly (under head (*d*)), that the parapet has not been finished with stone as required: I assess the damages (if such be the true remedy) at 2*l*. I postpone for the moment consideration as to the plaintiffs' proper remedy with regard to the non-provision of a pier and also with respect to the said minor matters until I have dealt with the plaintiffs' alternative claim.

Eighthly: This alternative claim raised, first, a question of fact, and, secondly, several points of considerable legal importance. I take them separately and concisely. In the first place, I am satisfied on the question of fact that the building of the plaintiffs had derived substantial support from the buildings of the defendants for a long period of time. The buildings were erected together, as already stated, 200 years ago. In many respects they may be regarded as one building divided by a partition wall. The front walls were continuous, the roof was continuous, and the buildings were, I think, built for the very purpose of mutual support. The plaintiffs' building admittedly leaned towards the defendants' structure. When the defendants' building was removed the London County Council served the dangerous structure notice on the plaintiffs. That notice was admittedly justified. I find as a fact, therefore, that the plaintiffs' building had been supported by the defendants' building for a long period of time. In the next place I am satisfied that an easement of support to a building can be obtained not merely by express or implied grant, but also under the Prescription Act of 1832. Such, I think, is the effect of *Dalton* v. *Angus*. (1) I cannot distinguish between support from land and support from buildings. I agree with and follow the decision of Hall V.-C. in *Lemaitre* v. *Davis*. (2) It is probable that the facts of this case would justify the implication of an implied grant. But in any

(1) (1881) 6 App. Cas. 740. (2) (1881) 19 Ch. D. 281.

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event I think that a right has been acquired by the plaintiffs under the above Act. I have found support as a fact. It is not suggested that the plaintiffs' enjoyment was either "vi" or "precario." But the defendants contend that the enjoyment was "clam." I am unable to accept that contention. The contiguity of the buildings, their interconnection, the continuity of the front wall, the similar continuity of the roof, were facts of the most patent description. He who saw the house could not fail to observe the mutuality of support. The test is this: Had the servient owner either the knowledge or the means of knowledge that the adjoining owner was enjoying the support of his (the servient owner's) lands or buildings? See *Dalton* v. *Angus* (1); *Gately* v. *Martin* (2); *Union Lighterage Co.* v. *London Graving Dock Co.* (3) In the present case I answer without hesitation the above question in the plaintiffs' favour. I find, therefore, that the plaintiffs possess an easement of support against the defendants.

Ninthly: But a serious question at once arises. Did such rights co-exist conjointly with the respective rights of the plaintiffs and the defendants under the London Building Act of 1894 in respect of rebuilding operations. In my opinion the answer is clearly No. The plaintiffs' and defendants' premises were within the area of the Act. The Act dealt in a striking and exhaustive fashion with the respective rights of owners within the statutory area whose land or buildings adjoined. An examination of the code at once shows that common law rights are dealt with in a revolutionary manner. The two sets of rights, namely, the rights at common law and the rights under the Act of 1894 (which followed the Act of 1855), are quite inconsistent with one another. The plaintiffs' common law rights are subject to the defendants' statutory rights. A new set of respective obligations has been introduced. The common law was seen to be insufficient for the adjustment of modern complex conditions. Hence I think that the Act of 1894 is not an addition to but in substitution for the common law with respect to matters which fall within the Act. It is a governing and exhaustive code, and the common law is by implication repealed. I follow the views on this point of Jessel M.R. in the case of *Standard Bank*

(1) 6 App. Cas. 740. (2) [1900] 2 I. R. 269.
(3) [1901] 2 Ch. 300.

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of British South America v. *Stokes* (1), Warrington J. in *Lewis* v. *Charing Cross Ry. Co.* (2), and also the dictum of Collins M.R. in *Leadbetter* v. *Marylebone Corporation.* (3) I therefore hold that the plaintiffs cannot succeed upon their claim at common law inasmuch as the defendants' party wall notice had been duly given under the provisions of the Act of 1894. In so holding I in no way negative the proposition that a plaintiff may bring his action for damages if he can establish that the defendant has exerted his statutory privileges so as to inflict injury on the plaintiff by negligence, improper obstructiveness, avoidable nuisance, or unreasonable delay: see *Pratt* v. *Hillman* (4); *Dodd* v. *Holme* (5); *Bower* v. *Peate* (6); *Percival* v. *Hughes.* (7) Many authorities on this point are collected in Browne and Allan on Compensation, 2nd ed., pp. 117—119.

Tenthly: It remains to consider the proper remedy of the plaintiffs upon the conclusions as I have stated them. In the first place I think it desirable to say that a decree of specific performance can in some cases appropriately be granted in order to carry out the terms of an award. Such decrees may be made, e.g. when the award directs the conveyance of land or the like: see *Hall* v. *Hardy* (8); *Wood* v. *Griffith* (9); and Russell on Arbitration, 9th ed., p. 333. Prima facie, however, the Court does not grant specific performance of contracts to execute repairs or to erect houses: see Fry on Specific Performance, paras. 98 et seq., and the authorities there cited. But if the work to be done is clearly and particularly specified, and if the complaining party cannot be adequately compensated in damages, then the Court can order the specific performance even of building or similar contracts: see the decision of the Court of Appeal in *Wolverhampton Corporation* v. *Emmons.* (10) In many cases under the London Building Act, 1894, it may be desirable for the Court to exert such powers, and it is important that the jurisdiction of the Court should be borne in mind. If I had deemed it proper to grant specific performance I should have allowed any necessary amend-

(1) (1878) 9 Ch. D. 68, 73.
(2) [1906] 1 Ch. 508, 516.
(3) [1904] 2 K. B. 893, 897.
(4) (1825) 4 B. & C. 269.
(5) (1834) 1 Ad. & E. 493.
(6) (1876) 1 Q. B. D. 321.
(7) (1882) 9 Q. B. D. 441; (1883) 8 App. Cas. 443.
(8) (1733) 3 P. Wms. 187, 190.
(9) (1818) 1 Swans. 43, 54.
(10) [1901] 1 K. B. 515.

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ment of the statement of claim, although it is doubtful (in view of Order xx., r. 6) whether such amendment would be needed. But in the present case I feel that specific performance could not be granted in respect of heads (*b*), (*c*), and (*d*) of the second award. The objections are obvious. Nor upon the whole do I think that a decree of specific performance should be granted with respect to the erection of the pier. In the first place I think that the plaintiffs can be adequately compensated by damages. In the next place I think that the circumstances are such as to render a decree of specific performance undesirable. The difficulties of enforcement would be obvious, and the attitude of the defendants and the London County Council do not alleviate such difficulties as may exist.

I therefore propose to do four things: First, to grant the plaintiffs a declaration under Order xxv., r. 5, that the award of January 7, 1916, is valid and binding; secondly, to give judgment for the sum of 27*l.* 6*s.*, the sum awarded to the plaintiffs for costs; thirdly, to award the plaintiffs damages in respect of heads (*b*), (*c*), and (*d*) to the extent of 9*l.*; fourthly, to award to the plaintiffs damages in respect of head (*a*), namely, the erection of the pier. It is not easy to assess such damages, but difficulty of assessment must not deter the Court: see *Chaplin* v. *Hicks* (1), per Vaughan Williams L.J. The defendants are not willing to erect a pier to the satisfaction of the arbitrators. They are equally unwilling to pull down the flank wall and rebuild it, which would be, I am satisfied, the only alternative to erecting the pier. The result is that the plaintiffs are left with a flank wall which is substantially weaker than it was, and which may at no far distant date become a dangerous structure. The plaintiffs had no power under their agreement with their occupying tenant to re-enter and rebuild the wall. The rent of the premises is 45*l.* per annum. I am satisfied that the value of the plaintiffs' premises has been substantially lessened by the default of the defendants in carrying out the award of January, 1916. I have considered the whole of the relevant evidence, and in the exercise of my judgment I think that the sum of 75*l.* is a proper sum to award the plaintiffs for the default of the defendants with respect to the pier.

(1) [1911] 2 K. B. 786, 792.

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It follows that there will be judgment for the plaintiffs for the sum of 27*l.* 6*s.*, 9*l.*, and 75*l.*, making a total of 111*l.* 6*s.* I will also, if the plaintiffs so desire, make the declarations I have indicated. Had the award been less than 100*l.* I should of course have certified that the action had been properly brought in the High Court. The defendants must pay the costs of the action.

I cannot conclude this judgment without expressing my appreciation to Mr. Macmorran and Mr. Cairns, counsel for the plaintiffs, and to Mr. Wild and Mr. Ricketts, counsel for the defendants, for their able assistance and arguments in a difficult and complicated case.

Judgment for the plaintiffs upon the award.

Solicitors for plaintiffs: *Geo. Brown, Son & Vardy.*
Solicitors for defendants: *Martineau & Reid.*

J. F. C.

In re AN ARBITRATION BETWEEN HARRISON AND MICKS, LAMBERT & CO.

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Feb. 21.

Sale of Goods—Contract—Construction—Remainder of Cargo "more or less about" specified Quantity.

Buyers verbally agreed with a seller to purchase the remainder of a cargo of wheat ex *Clodmore* which the seller estimated at 5400 quarters. At the time of the verbal agreement the buyers stipulated that they should have the whole of the remainder of the cargo. On the same day the seller sent to the buyers a contract in writing by which he sold to the buyers "the remainder" of the cargo "(more or less about) 5400 quarters Manitoba wheat . . . . at Hull ex *Clodmore*." The buyers accepted delivery of about 5400 quarters. The seller had, in fact, made a miscalculation, and at the time of the sale he had 574 quarters more than 5400 quarters in hand. Rules and conditions were indorsed on the written contract, of which condition 3 was as follows: "The word 'about' when used in reference to quantity shall mean within 5 per cent. over or under the quantity stated." The buyers contended that, having regard to the condition, the most they could be compelled to accept was 4500 quarters plus 270 quarters, i.e. plus 5 per cent., on the 5400 quarters:—

Held, that the words "more or less about 5400 quarters" were merely words of estimate; that the subject-matter of the contract

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was a sale of the whole of the remainder of the cargo, the governing word being "remainder"; and that the buyers must accept the remainder, although it amounted to more than 5400 quarters with a margin of 5 per cent.

Levi v. *Berk* (1886) 2 Times L. R. 898 and *Borrowman* v. *Drayton* (1876) 2 Ex. D. 15 followed.

SPECIAL CASE stated by the Appeal Committee of the Hull Corn Trade Association.

Harrison (hereinafter called "the seller") carried on business as a corn merchant at Liverpool, and Micks, Lambert & Co. (hereinafter called "the buyers") were corn merchants carrying on business at Hull. Prior to April 27, 1916, the seller sold to various persons, including the buyers, part of a cargo of wheat ex *Clodmore*. On April 27 the buyers verbally agreed with the seller to purchase the remainder of the cargo, which the seller estimated at 5400 quarters. At the time of the verbal agreement the buyers stipulated that they should have the whole of the remainder of the cargo, and on the same day the seller sent by post from Liverpool a contract in writing, bearing the date April 27, 1916, by which he sold to the buyers "the remainder (more or less about) 5400 quarters Manitoba wheat . . . . at Hull ex *Clodmore*." The buyers accepted delivery of about 5400 quarters. The seller had, in fact, made a miscalculation, and at the time of the sale he had 574 quarters more than 5400 quarters in hand. He contended that the effect of the contract was that the buyers were liable to take delivery of the 574 quarters in addition to the 5400 quarters. The buyers contended that the word "remainder" was governed by the words "about 5400 quarters," and that they could not be compelled to take more than "about 5400 quarters," and that any excess remaining must be held by the seller on his own account. The seller admitted that the dispute had arisen owing to his mistake in calculating the quantity of wheat which he had disposed of. The contract was in the printed form of the Hull Corn Trade Association, Limited, and was headed "No. 1 Spot Contract." Rules and conditions were indorsed on the contract, of which condition 3 was as follows: "The word 'about' when used in reference to quantity shall mean within 5 per cent. over or under the quantity stated." In view of that clause the buyers contended that at the most they could be compelled to

accept 5400 quarters plus 270 quarters, i.e. 5 per cent., on the 5400 quarters. The question for the opinion of the Court was (inter alia) whether on the true construction of the contract the buyers were liable to take delivery of the whole of the remainder beyond 5400 quarters.

Greer, K.C., and *Keogh*, for the sellers. The buyers bought the remainder of the cargo. The words "(more or less about) 5400 quarters" are only words of estimate: *Levi* v. *Berk* (1); *Borrowman* v. *Drayton*. (2) The "remainder" is a specific quantity, i.e., the part of the cargo not disposed of. It is a quantity capable of being ascertained. The word "remainder" is the controlling word in the contract: *Tancred, Arrol & Co.* v. *Steel Co. of Scotland*. (3) If the contract meant that about 5400 quarters were sold there would have been no object in inserting the word "remainder" in the contract. The sellers are bound to deliver and the buyers to accept what in fact remains: *McLay & Co.* v. *Perry & Co.* (4) The Appeal Committee found that the remainder amounted to 574 quarters, and that quantity the buyers are bound to accept.

G. Wallace, K.C., and *Robertson Dunlop*, for the buyers. The description in the contract of what is sold is "the remainder (more or less about) 5400 quarters." The words "more or less about" cannot include such a large amount as 574 quarters. The condition in the contract expressly defines the word "about" as meaning within 5 per cent. over or under the quantity stated. The words "shall mean" are exclusive. It is a contract to sell about 5400 quarters within limits of 5 per cent. more or less: *Bowes* v. *Shand*. (5) The words in the contract are part of the description and must be complied with in every respect. The sale of a specific thing may nevertheless be a sale by description: *Varley* v. *Whipp*. (6) In the contract the quantity mentioned is part of the description. The seller knows what the cargo is, while the buyer does not and is completely in the hands of the seller. The words "more or less" are mere surplusage when used in conjunction with the word "about." It is impossible to construe the definition in the contract

(1) 2 Times L. R. 898.
(2) 2 Ex. D. 15.
(3) (1890) 15 App. Cas. 125, 140.
(4) (1881) 44 L. T. 152.
(5) (1877) 2 App. Cas. 455.
(6) [1900] 1 Q. B. 513.

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of the word "about" in such a way as to give that word no meaning. The reason why the quantity 5400 quarters is mentioned in the contract is that it is extremely difficult to fix the amount of the remainder of a cargo. [The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 13, 30, *Heilbut, Symons & Co.* v. *Buckleton* (1), *Brawley* v. *United States* (2), *Cross* v. *Eglin* (3), *Reuter & Co.* v. *Sala & Co.* (4), *Morris* v. *Levison* (5), *Miller* v. *Borner & Co.* (6), and Benjamin on Sale, 5th ed., p. 709, were also referred to.]

BAILHACHE J., having stated the facts, continued: The question is whether on the true construction of the contract the buyers are liable to take delivery of the remainder, the 574 quarters, and the point for our determination is whether under the contract there was a sale of 5400 quarters "more or less about"—the words "more or less about" merely giving a 5 per cent. margin within which the buyer or the seller were bound to accept or deliver as the case might be—or whether the quantity "5400 quarters more or less about" are words of estimate; and the subject-matter of the sale is the remainder of the cargo ex *Clodmore*. I have come to the conclusion that upon the true construction of the contract the subject-matter of the sale was the remainder of the cargo ex *Clodmore*.

In my judgment the words "5400 quarters more or less about" are, as they prima facie appear to be, words of estimate and of estimate only, and the ruling words are "the remainder of the cargo." We could not hold otherwise without departing from the reasoning in *Levi* v. *Berk* (7) and *Borrowman* v. *Drayton*. (8) In *Levi* v. *Berk* (7) there was a sale of a cargo which was said to be about 450 tons. When the goods came to be delivered it turned out that instead of being 450 tons the cargo was only 341 tons. The proportion of divergence between the two figures in that case was very much larger than in the present one. Lord Esher M.R. in giving judgment said: "As to the other point, no doubt the difference in quantity was serious and considerable, but it did not appear that there was any fault or default in not obtaining a full

(1) [1913] A. C. 30.
(2) (1877) 96 U. S. (6 Otto) 168.
(3) (1831) 2 B. & Ad. 106.
(4) (1879) 4 C. P. D. 239.
(5) (1876) 1 C. P. D. 155.
(6) [1900] 1 Q. B. 691.
(7) 2 Times L. R. 898, 899.
(8) 2 Ex. D. 15.

cargo, or that the party did not obtain all that he could, and in the ordinary view of such documents there was not a total failure in the performance of the contract. Effect must be given to the word 'cargo' without requiring the quantity specified, and where the buyer contracted for a 'cargo' and mentioned the quantity (unless something plainly showed the contrary to be intended), the governing word was 'cargo,' and the buyer was bound to take the cargo whatever its quantity might be. The judgment, therefore, was for the sellers, the appellants."

In my judgment the parties in the present case were on the one hand contracting to sell and on the other hand to buy what was left of the cargo ex *Clodmore*—whatever that might happen to be; and it seems to me that, following the reasoning, and indeed the decision, in *Levi* v. *Berk* (1), I must give effect to the words "remainder of the cargo" in the contract in the present case and treat the words "5400 quarters more or less about" as mere words of estimate.

In *Borrowman* v. *Drayton* (2), which was the converse of *Levi* v. *Berk* (1), the judgment of Mellish L.J. is based on closely the same lines of reasoning. In *Levi* v. *Berk* (1) the cargo turned out much less, but in *Borrowman* v. *Drayton* (2) the cargo turned out to be in excess of the estimated quantity, and it was held, notwithstanding that, that the buyer was entitled to the whole of the cargo which was in fact carried. The contract began with the words "Sold this day for Borrowman, Phillips & Co. to John B. Drayton & Co. a cargo of from 2500 to 3000 barrels." The total quantity carried was 3300 barrels, which was in excess of the maximum quantity named in the contract. Mellish L.J., in delivering the judgment of the Court, said (3): "Generally speaking, the term 'cargo,' unless there is something in the context to give it a different signification, means the entire load of the ship which carries it, and it may fairly be assumed that when one man undertakes to sell and another to buy a cargo, the subject-matter of the contract is to be the entire load of the ship. And that such must have been the sense in which the term 'cargo' is used in this contract is materially strengthened by the agreement that the vessel shall proceed to a port of discharge to be determined, within certain limits, by the buyer, shewing plainly

(1) 2 Times L. R. 898. (2) 2 Ex. D. 15.
(3) 2 Ex. D. 15, 19.

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that what was contemplated was that the vessel and its entire cargo were to be at his disposal. There are various reasons why a purchaser may wish to buy the whole quantity of goods loaded on board of a particular vessel. Such a contract gives him the complete control of the vessel." Then he gives a variety of reasons of that kind, but the judgment was that the ruling words were "the cargo." So in the present case, although it is true that the same reasons which induce a man to desire to have the whole cargo do not apply when he is only dealing with the remainder of the cargo, yet I think that the rule which was applied in *Borrowman* v. *Drayton* (1) applies in the present case, and I must hold that the governing and ruling words are "the remainder of the cargo."

The conclusion at which I have arrived is that the parties in the present case were dealing with—they were buying and selling—so much of the cargo ex *Clodmore* as happened to be left, and the words "5400 more or less about" were the seller's estimate of what that remainder of the cargo was. The estimate was exceeded, but, notwithstanding the excess, the buyer is, in my judgment, bound to take the 574 quarters, or whatever the excess may turn out to be. That conclusion is, I think, very strongly borne out by *McLay & Co.* v. *Perry & Co.* (2), where the parties were dealing with a heap of scrap iron in a yard. There it was clear that the subject-matter of the bargain was the heap of scrap iron. It is true that the estimate of the heap given was very much greater than the heap turned out to be; but, inasmuch as it was held that what they were really bargaining about was the heap, the fact that the estimate of what was in the heap was incorrect was immaterial.

ATKIN J. I agree. I think that in all these cases one has to look to the particular contract and construe it. It is difficult to lay down a general rule, but it is quite plain that one must apply the ordinary principles of construction and try to give the words in the contract their reasonable and ordinary meaning. In a commercial contract for the sale of goods it is quite usual to define the subject-matter, after the description of quality, in terms of quantity. On the other hand, it is not at all uncommon to define the subject-matter of the sale by reference to attributes other than mere quantity—for

(1) 2 Ex. D. 15. (2) 44 L. T. 152.

instance by relation to its locality past or future, its ownership, manufacture, or other respect. And if it is defined by each party saying in effect "I bargain to bring into the contract those relations" they must be given effect to. In the present case the contract begins by saying that the seller has sold the "remainder," and, omitting for the moment the words of quantity, that would be the remainder of Manitoba wheat ex *Clodmore*. That, so far, seems to be a description of the subject-matter as far as the amount is concerned. It is not expressed in the ordinary terms of quantity by reference to weight or number; but after "remainder" the contract contains the term "more or less about 5400 quarters." Having already defined what it is to be, namely, "remainder," it appears to me that the full and proper effect is given to the words which follow by treating them as terms of estimate. No language could more clearly point to something in the nature of an estimate than those words "more or less" and "about"; and it appears to me on the true construction of this contract, and following the lines of reasoning suggested by the authorities to which my brother has referred, that that is the right view to take in this case.

It is true that when a person buys a remainder he may be buying a quantity which may vary within quite large limits; but it is perfectly possible for him to adopt words in the contract of sale which would prevent him from being exposed to any extreme variation, because he can quite easily say "not to exceed so much," or "not to be less than so much." If he says so, of course that would define the subject-matter. Moreover, it might very well be that in entering into such a contract as this a seller might have made representations which, if untrue, would entitle the buyer to rescind his contract if he discovers the misrepresentations in time. That has not been suggested, and the buyers have in fact taken delivery of the great bulk of the remainder. It is not necessary in the present case to define the precise meaning of the expression "remainder," nor to ascertain precisely how much is now left; but we have to decide whether on the contract the buyers were obliged to accept the remainder, even although it amounted to more than 5400 quarters with a margin of 5 per cent. In my view they were, and I think we ought to answer the question

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by saying that on the true construction of the contract the buyers are bound to take delivery of the whole of the remainder.

Solicitors for seller: *Rawle, Johnstone & Co., for Laces, Wilson & Co., Liverpool.*

Solicitors for buyers: *Pritchard & Sons, for A. M. Jackson & Co., Hull.*

J. E. A.

1917
Feb. 21.

NEW RIVER COMPANY *v.* CRUMPTON.

Landlord and Tenant—Breach of Covenant to Repair—Acceptance of Rent after Notice to Repair—Waiver of Forfeiture—Continuing Breach—Necessity of Fresh Notice—Conveyancing and Law of Property Act, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 14, *sub-s.* 1.

The defendant was tenant to the plaintiffs of a house under a lease containing a covenant to repair. The house being out of repair, the plaintiffs served the defendant with a notice under the Conveyancing Act, 1881, of the breach of the covenant, together with a requisition to repair within three months and a schedule of the repairs required to be done. Subsequently the plaintiffs accepted from the defendant a half-year's rent which had accrued due since the date when the notice expired. In an action to recover possession of the premises in respect of the continuing breach of covenant arising out of their non-repair since the date when the rent so accepted became due:—

Held, that, as the only object of the notice under the Act was to inform the tenant what she was required to do, no new notice was necessary to support the action, even though so long an interval as twelve months had elapsed between the date of the expiry of the notice and the commencement of the action, and though the tenant had done a portion of the required repairs in that period, so that the physical condition of the premises which she was required to make good was not the same when the action was brought as when the notice was given. The tenant knew what she had been required to do and what she had left undone, and that was sufficient to keep the notice applicable.

Penton v. *Barnett* [1898] 1 Q. B. 276 and *Guillemard* v. *Silverthorne* (1908) 99 L. T. 584 considered.

TRIAL of action before Rowlatt J.

By an indenture of lease dated July 13, 1843, the plaintiffs' predecessors in title demised to one Borchert Brunies and his

assigns a house in Clerkenwell known as 6, Percy Circus, for a term of seventy-seven and a quarter years from Michaelmas, 1841, at a yearly rent of 6*l*. In December, 1914, the premises were out of repair, the defendant, Miss Crumpton, being then in occupation, and on December 11 the plaintiffs served upon her at 6, Percy Circus, a notice addressed to the lessee, assignee, or other person entitled to the leasehold term specifying the breach of covenant complained of, together with a requisition to repair within three months and a schedule of the repairs which they required to be done to remedy the breach. The schedule contained a long list of dilapidations. The defendant between the date of the notice and that of the commencement of the action did repairs in respect of three items in the list, but no more, and the notice was substantially uncomplied with. On January 15, 1915, the plaintiffs received from the defendant the half-year's rent due at Christmas, 1914; on July 1, 1915, they received the half-year's rent due at Midsummer, 1915, and in January, 1916, a further half-year's rent due at Christmas, 1915. The action which was brought to recover possession of the premises for breach of the covenant to repair was commenced on March 22, 1916. The substantial defence was that the action could not be supported without a fresh notice served subsequently to Christmas, 1915, when the last half-year's rent accepted by the plaintiffs became due.

Graham Mould, for the plaintiffs. It is conceded that by acceptance of rent the plaintiffs waived the forfeiture for the breaches of the covenant to repair down to the date when the last rent so accepted became due, that is to say, Christmas, 1915. But the breach of covenant was a continuing breach, and the non-repair after that date gave rise to a fresh forfeiture, in respect of which the action may be maintained without any fresh notice under s. 14 of the Conveyancing Act, 1881: *Penton* v. *Barnett*. (1)

Van den Berg, for the defendant. A fresh notice was necessary. This case is distinguishable from *Penton* v. *Barnett*. (1) There a three months' notice to repair the breach expired on December 22, 1896. Three days later a quarter's rent became due. On January 14, 1897, the lessor brought the action to recover possession of the

(1) [1898] 1 Q. B. 276, 280, 281.

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premises, and in it claimed the quarter's rent. The reason why the Court of Appeal held that no new notice was necessary was that they assumed that the condition of the premises was the same at the date of the writ as at that of the expiration of the notice to repair. In the short interval of twenty-three days it was improbable that the disrepair would have substantially increased as the result of the operations of nature, while the tenant had not altered the condition of the premises by doing partial repairs, for the case states that he had done none at all. A. L. Smith L.J. said: "It is said that the notice does not cover the breaches between December 25 and January 14. In my opinion this answer is insufficient, because the breaches during this latter period are the same as those in respect of which the notice was given"; and Collins L.J. said: "We ought to construe the words 'particular breach' in the section according to the obvious intention of the Legislature, which was that the tenant should be informed of the particular condition of the premises which he was required to remedy. . . . . The common sense of the matter is, that the tenant is to have full notice of what he is required to do. He has had notice, and has failed to act on it; and with regard to that the physical condition of the premises which he was required to make good was the same when the action was brought as when the notice was given. Under these circumstances, I agree that the requirements of the Conveyancing Act have been complied with, and that the tenant has, within the meaning of s. 14, had notice of the breach of covenant which is the foundation of the action." The present case is distinguishable in two respects. Here there was a substantial interval of twelve months between the date when the notice to repair expired on March 11, 1915, and that of the commencement of the action on March 22, 1916, so that it may well be that from natural causes alone the condition of the premises would not have been the same on the two dates; and, further, the physical condition of the premises was materially altered by the fact that the defendant had done a portion of the required repairs. It was on similar grounds that Ridley J. distinguished the case of *Guillemard* v. *Silverthorne*. (1) There six months at least had elapsed between the expiry of the notice to repair and the issue of the writ, and the defendant had done some

(1) 99 L. T. 584.

repairs in that period. On those grounds the judge held that a fresh notice was necessary, and in the absence of it gave judgment for the defendant. That case is a direct authority in the present defendant's favour.

ROWLATT J. In this case a point has been taken on behalf of the defendant which is of some difficulty. It is clear that at common law acceptance of rent accrued due after a breach of covenant is a waiver of the forfeiture which the breach would otherwise have involved. Here the rent due at Christmas, 1915, was accepted by the plaintiffs; therefore any forfeiture which had arisen before that date was waived. But it is also clear at common law that the breach of a covenant to repair is a continuing breach from day to day, and therefore, though acceptance of rent is a waiver of forfeiture up to the date when the rent so accepted became due, it is not a waiver of any forfeiture for non-repair after that date; and here the premises continued to be in a state of disrepair after that date and down to the time of action brought. Then there comes in s. 14 of the Act of 1881, which requires a notice to be served on the lessee as a condition precedent to the enforcement of the forfeiture by action; and the question arises whether, when a notice under the section has been given, and then the lessor by accepting rent waives the forfeiture down to the date when that rent accrued due, a new notice must be given in respect of the fresh forfeiture arising from the subsequent non-repair. This case seems to be very similar to that of *Penton* v. *Barnett*. (1) There Collins L.J. said: "It is said that the breach of covenant in respect of which this action to recover possession is brought is not the antecedent failure to repair in respect of which three months' notice was given on September 22, but the failure to repair day by day after December 25"—when the rent, the acceptance of which waived the forfeiture, became due—"and that in respect of this a fresh notice must be given. If the section is to be construed with a great degree of strictness, that might be so. I think, however, that we ought to construe the words 'particular breach' in the section according to the obvious intention of the Legislature, which was that the tenant should be informed of the particular

(1) [1898] 1 Q. B. 276, 281.

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condition of the premises which he was required to remedy." He then went on to point out that in that case the tenant had had notice and had failed to act on it, and he accordingly held that no fresh notice was necessary. It is true that he laid stress on the fact that "the physical condition of the premises which he was required to make good was the same when the action was brought as when the notice was given"; and the present case admittedly differs from that of *Penton* v. *Barnett* (1) in this respect, that here the tenant had done some partial repairs in obedience to the notice, and therefore the physical condition of the premises was to that extent altered. But what I think that the Court of Appeal meant to hold was that the condition of the premises at the time of action brought must be such that the notice shall still be applicable, that is to say, that there shall be certain of the repairs specified in the schedule which to the knowledge of the tenant are still unexecuted. Here the tenant had done only three items out of a long list of required repairs. She knew what she was required to do and what she had left undone, and that, in my opinion, is enough. I cannot think that the fact of the tenant doing a small portion of the required repairs makes the notice any the less applicable to the residue which have not been done, or that the Court of Appeal intended so to hold. It may be that my decision is not quite in accord with the judgment of Ridley J. in *Guillemard* v. *Silverthorne* (2), but I feel bound to follow what I think was the real meaning of the Court of Appeal. I must therefore hold that the defendant's point fails.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Thompson & Debenhams.*
Solicitors for defendant: *Engall & Crane.*

(1) [1898] 1 Q. B. 276. (2) 99 L. T. 584.

J. F. C.

PANCUTSOS v. RAYMOND HADLEY CORPORATION OF NEW YORK.

1917
Feb. 22.

Sale of Goods—Contract for Sale and Delivery by Instalments—Condition as to Payment—Breach of Condition—Waiver by Seller—Right to cancel Contract—Notice by Seller of Intention to cancel.

A contract, made in September, for the sale and shipment of 4000 tons of flour, to be shipped to Greece not later than November 7, provided that "each shipment shall be deemed a separate contract," and that payment should be "by confirmed bankers' credit." The buyer opened a bankers' credit which was not in fact "confirmed"; and the seller, with knowledge of that fact, made some shipments and also obtained from the buyer an extension of time to November 30 for shipment of the balance of the flour. On November 25 the seller cancelled the contract as to the shipment of the balance of the flour, without any previous notice, upon the ground that the credit was not in accordance with the contract:—

Held, that by waiving for a time the breach of the condition as to a confirmed credit, the seller was not bound to act upon that credit up to the end of the contract, but that he was not entitled to cancel the contract without giving the buyer reasonable notice of his intention to cancel.

By a contract in writing the defendants sold to the plaintiff 4000 tons of flour, to be despatched by steamer or steamers to Greece as per bills of lading dated not later than November 7, 1915. Each shipment was to be deemed a separate contract. Payment was to be made by cash against documents in New York; and there was this provision in the contract: "Payment by confirmed bankers' credit." On October 15 a credit had been opened in favour of the defendants at a New York bank on the instructions of the plaintiff in respect of the shipment of 4000 tons of flour up to November 7, but there was no guarantee as to the period for which the credit was to remain in force. On October 21, and again between October 27 and 30, the defendants made shipments of flour, for which they were duly paid by the New York bank in exchange for shipping documents. On or before October 27 the defendants became aware that the credit at the New York bank was not irrevocable. On November 15 the defendants requested the plaintiff to extend the time for the shipment of the balance of the flour from

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November 7 to November 30, and to this the plaintiff agreed. On November 25 the defendants notified the plaintiff that the balance of their contract was cancelled on the ground (among others) that the plaintiff had not performed the condition as to "payment by confirmed bankers' credit." The credit opened at New York was not in fact in accordance with the contract. The plaintiff refused to accept this cancellation of the balance of the contract, and the dispute which then arose was referred to arbitration.

Before the arbitrators the defendants contended that the plaintiff had failed to comply with the conditions of the contract, as he had failed to open a credit at New York, which would be irrevocable until November 30; and that the fact that they had made shipments without insisting on this condition did not release the plaintiff in respect of subsequent shipments, especially having regard to the term of the contract that "each shipment shall be deemed a separate contract." The plaintiff contended that the defendants had accepted as satisfactory the credit which had been opened, and, having made a shipment under it, had waived any possible objection to it and could not repudiate their obligation to ship the balance of the flour, or could not do so without giving due notice to him so as to enable him to remove any valid objection and furnish such a credit as would satisfy them.

The arbitrators awarded that the defendants were in default in not shipping the balance of the flour in accordance with the contract, and that they should pay a certain sum as damages; and they stated their award in the form of a special case for the opinion of the Court. The question for the opinion of the Court was whether or not upon the above facts there was any evidence upon which the arbitrators could properly find that the defendants had waived the term in the contract that payment should be by confirmed bankers' credit; and whether their award was correct.

Roche, K.C., and *R. A. Wright*, for the plaintiff. Upon the documents and the findings of fact the arbitrators were clearly entitled to find as a fact that there was a waiver by the sellers of the condition as to opening a confirmed credit: *Bentsen* v. *Taylor, Sons & Co.* (*No.* 2). (1) Further, even if the sellers were

(1) [1893] 1 Q. B. 274.

entitled to cancel the contract because the condition had not been performed, yet, after having acted upon the contract after they had knowledge of the non-performance of the condition, they were bound to give the buyer reasonable notice of their intention so as to enable him to remedy the defect in the credit which had been opened.

Stuart Bevan, for the defendants. There was no evidence before the arbitrators upon which they could properly find that there had been a waiver by the sellers of the breach of the condition. By the terms of the contract "each shipment shall be deemed a separate contract," and, that being so, it is impossible to say that the waiver of the condition in respect of one or more shipments could be a waiver in respect of future shipments. If the sellers did not waive the condition as to the whole of the shipments, they had a right to say at once, if they chose, that the contract was cancelled because the condition had not been fulfilled: *Ebbw Vale, &c., Co.* v. *Blaina Iron, &c., Co.* (1)

Roche, K.C., replied.

BAILHACHE J. [After stating the facts and circumstances as above, the learned judge said:] The whole point of this case turns upon the clause in the contract, "payment by confirmed bankers' credit." The arbitrators have found that the credit opened by the buyer was not a "confirmed bankers' credit."

The first question is whether the sellers had, by acting upon a credit opened not in accordance with the contract, which they might have refused to accept if so minded, with knowledge of the fact that the credit was not in accordance with the contract, waived their right to cancel the contract upon the ground that it was not the contractual credit. I think that the matter stands in this way: When the sellers know that the credit is not in order, and yet proceed to act upon it as if it is in order, they must be taken to have waived the informality so long as they choose to act upon that credit; but I do not think that they are bound to act upon it right up to the end of the contract merely because they acted upon it at first and waived the informality up to a point. I think that the sellers can at any time insist upon the credit being put in order,

(1) (1901) 6 Com. Cas. 33.

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but that, if they have acted upon it up to a certain time without it being in order, they cannot then suddenly turn round and without warning claim to cancel the contract because the credit upon which they have acted as being in order is not in fact in order. If they desire to cancel the contract in circumstances such as these I think that they must give some reasonable notice to the other party of their intention so to do. The sellers have not given any such reasonable notice. In my opinion, therefore, the sellers struck too soon, and a cancellation of the contract on the ground that the credit was not in order ought to have been preceded, in the circumstances of this case, by a reasonable notice to the buyer that they would cancel the contract.

The arbitrators, therefore, have come to a right conclusion in the case, and I so answer the question put to me.

Award confirmed.

Solicitors for plaintiff: *Stibbard, Gibson & Co.*

Solicitors for defendants: *Coward, Hawksley, Sons & Chance.*

J. H. W.

[IN THE COURT OF APPEAL.]

C. A.
1917
March 1.

SHARP BROTHERS & KNIGHT *v.* CHANT.

Emergency Legislation—Landlord and Tenant—Increase of Rent—Dwelling-house rented at less than 26l. a year—Rent increased before November 25, 1915—Payment by Tenant till January 31, 1916—Right of Tenant to recover Amount paid in excess of Standard Rent —"Fine, premium, or other like sum in addition to rent"—Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 *& 6 Geo.* 5, *c.* 97), *s.* 1, *sub-ss.* 1, 2; *s.* 2, *sub-ss.* 1, 2 (*c*).

The Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, provides by s. 1, sub-s. 1, that where the rent of a dwelling-house to which the Act applies has been, since the commencement of the present war, increased above the standard rent (the rent at which the house was let on August 3, 1914), the amount by which the rent payable exceeds the standard rent shall, notwithstanding any agreement to the contrary, be irrecoverable, with a proviso that the sub-section shall not apply to rent accrued due before November 25, 1915; and by s. 1, sub-s. 2, that a person shall not, in consideration of the grant, renewal, or continuance of a tenancy of any dwelling-house to which the Act applies, require the payment of any fine, premium, or like sum in addition to the rent, and when any such payment has been made after November 25, 1915, then the amount shall be recoverable by the tenant and may be deducted by him from any rent payable by him to the landlord. The Act came into force on December 23, 1915.

The landlord of a dwelling-house, to which the Act applied, in March, 1915, increased the tenant's rent by 6*d.* a week. The tenant paid the increased rent and, in ignorance of the Act, continued to do so until January 31, 1916. Having then become aware of the Act, he deducted from his subsequent payment of rent the total amount of the increase over the standard rent which he had paid between November 25, 1915, and January 31, 1916. In an action by the landlord to recover the amount so deducted:—

Held, (1.) that the amount overpaid by the tenant was not a "fine, premium, or other like sum" which he was entitled to deduct from his rent under s. 1, sub-s. 2; and (2.) that although the Act provided that the increase beyond the standard rent was not recoverable by the landlord if the tenant had not paid it, yet the tenant, having paid it under mistake of law, was not entitled to recover it from the landlord in any shape or form.

Decision of the Divisional Court (Ridley and Avory JJ.) reversed.

APPEAL from the decision of a Divisional Court (Ridley and Avory JJ.).

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The plaintiffs, who were the owners of certain dwelling-houses in Birmingham, in 1907 let one of them to the defendant at a rent of 9*s.* 6*d.* a week, the landlords paying the rates. In March, 1915, they informed the defendant that his rent would be increased to 10*s.* a week, otherwise he would have notice to quit. The tenant protested, but eventually paid the increased rent, and continued to do so until January 31, 1916.

On December 23, 1915, the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (1), received the Royal assent.

On February 9, 1916, the tenant, having become aware of the existence of the Act, tendered the sum of 4*s.* 6*d.*, being a week's rent, due on February 7, at the old rate less 5*s.*, being ten weeks'

(1) Sect. 1 provides: "(1.) Where the rent of a dwelling-house to which this Act applies . . . . has been, since the commencement of the present war, or is hereafter during the continuance of this Act, increased above the standard rent . . . . as herein-after defined, the amount by which the rent . . . . payable exceeds the amount which would have been payable had the increase not been made shall, notwithstanding any agreement to the contrary, be irrecoverable: Provided that—(i.) This subsection shall not apply to any rent . . . . which accrued due before the twenty-fifth day of November, 1915; . . . .

"(2.) A person shall not in consideration of the grant, renewal, or continuance of a tenancy of any dwelling-house to which this Act applies, require the payment of any fine, premium, or other like sum in addition to the rent, and where any such payment has been made in respect of any such dwelling-house after the twenty-fifth day of November, 1915, then the amount shall be recoverable by the tenant by whom it was made from the landlord, and may without prejudice to any other method of recovery be deducted from any rent payable by him to the landlord, but this provision shall not apply to any payment under an agreement entered into before the fourth day of August, 1914."

Sect. 2: "(1.) For the purposes of this Act, except when the context otherwise requires:—(*a*) The expression 'standard rent' means the rent at which the dwelling-house was let on the third day of August, 1914, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said third day of August, the rent at which it was first let. . . . .

"(2.) This Act shall apply to a house or part of a house let as a separate dwelling . . . . where either the annual amount of the standard rent or the rateable value of the house or part of the house does not exceed . . . . (*c*) in the case of a house situate elsewhere" (than in London or Scotland) "twenty-six pounds."

increase of 6*d.* per week calculated from November 25, 1915, to January 31, 1916. He claimed that under the Act he had the right to deduct from the rent or to recover by action the increase that he had paid since November 25, 1915. The plaintiffs refused to receive the 4*s.* 6*d.* tendered, and on February 14 the defendant tendered 14*s.*, being the 4*s.* 6*d.* already referred to and 9*s.* 6*d.* for the week ending February 14. The plaintiffs accepted this amount as a payment on account, and brought an action in the county court to recover the 5*s.* which the defendant had deducted.

The county court judge dismissed the action, on the ground that the plaintiffs had since March, 1915, required payment by the defendant of "a fine, premium, or other like sum in addition to the rent" within s. 1, sub-s. 2, of the Act, and that the defendant was entitled to deduct from his rent the moneys overpaid, while, there having been a total failure of consideration, the plaintiffs were not entitled to recover such moneys.

The plaintiffs appealed to the Divisional Court. The Divisional Court (Ridley and Avory JJ.), while differing from the reasons of the county court judge and holding that the extra 6*d.* a week was not "a fine, premium, or other like sum" within s. 1, sub-s. 2, but was a simple increase of the rent to be paid by the tenant, yet affirmed his decision on the ground that the increase paid after November 25, 1915, was not money paid by the tenant under a mistake of law, i.e., under the belief that he was bound by law to pay it, but was paid under duress, i.e., in the belief that if he did not pay it his tenancy would be determined, and therefore it did not come within the principle of the authorities in which it has been held that money paid under a mistake of law cannot be recovered. It was not a voluntary payment, but was made under undue pressure. They accordingly declared that the judgment of the county court judge dismissing the action must stand.

The plaintiffs appealed.

J. L. D. Ridsdale (for *A. Ward*) (*J. B. Matthews, K.C.*, with him), for the appellants. The question is (1.) whether the Act enables the tenant to deduct from his rent sums paid by him in excess of the standard rent, and (2.) whether he has any right at common law to recover the sums so overpaid. These sums were paid voluntarily,

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and not under any coercion or duress. At the time when the plaintiffs raised the rent they had a perfect right to do so. The defendant paid the increase under the belief that he was bound to do so and that the plaintiffs had power to enforce it—i.e., he paid it under a mistake of law, and therefore cannot recover it.

Holman Gregory, K.C. (*Norman Birkett* with him), for the respondent. The defendant is entitled to recover these sums as money had and received. They were not paid under mistake of law, but under pressure. The Act made it illegal for the landlords to receive them. When a person is illegally called upon to pay money in order to get something done which ought to be done without such payment, and he pays it under protest, he is entitled to recover it: *Parker* v. *Great Western Ry. Co.* (1)

[SCRUTTON L.J. Has the doctrine ever been applied where the payment was legal at first and afterwards became illegal?]

I do not know of any such case. As to the rent paid between November 25, 1915, and January 31, 1916, the plaintiffs have in their pockets money belonging to the defendant which he has overpaid. Under the circumstances, the tenant having deducted it from his rent, the plaintiffs are not entitled to recover.

LORD COZENS-HARDY M.R. This appeal, although relating only to a very small sum of money, raises a point of undoubted importance. The facts are simple.

The defendant, Chant, has since 1907 been the tenant of a small tenement to which the Act of 1915 applies. The original rent was 9*s.* 6*d.* a week, the landlord paying rates. In March, 1915, the rent was raised from 9*s.* 6*d.* to 10*s.* a week, the alternative being notice to quit. What was the position, then? There was nothing whatever wrong in the landlord saying to his weekly tenant "9*s.* 6*d.* a week is not enough; you must pay me 10*s.* a week, or I shall serve you with notice to quit." There was no illegality in that, and there was in no sense duress or undue pressure which the law does not allow. The landlord was exercising his undoubted legal right in saying to the tenant "If you do not pay a rent which I think this house is worth I must give you notice to quit." At that date it was impossible to complain of that increase of rent. The rent of 10*s.* a week was

(1) (1844) 7 Man. & G. 253.

paid until January 31, 1916, and there is no suggestion of any subsequent threat of giving notice to quit if the 10*s.* a week was not paid. In the meantime the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, had been passed. It received the Royal assent on December 23, 1915. Sect. 1 provides that "Where the rent of a dwelling-house to which this Act applies has been since the commencement of the present war" (that is, since August, 1914) "or is hereafter during the continuance of this Act increased above the standard rent or the standard rate of interest as hereinafter defined, the amount by which the rent or interest payable exceeds the amount which would have been payable had the increase not been made shall notwithstanding any agreement to the contrary be irrecoverable." Then there is the proviso: "This subsection shall not apply to any rent or mortgage interest which accrued due before the 25th day of November, 1915." Now the Act is undoubtedly retrospective to some extent. To what extent is it retrospective? What happened was this: The landlord and the tenant for some time continued the arrangement that the tenant should pay 10*s.* a week. It was paid, I think, up to January 31, 1916, that is a little more than a month after the commencement of the operation of the Act. The tenant then took this view: I have paid 6*d.* a week more than the landlord was entitled to, and I claim that back, and either in the shape of a set-off against the claim for future rent, or in some shape or other, I say I am entitled to be repaid by the landlord 6*d.* a week for ten weeks. The question is whether he is or is not entitled to it. In my opinion he is not. We certainly ought not to stretch the language of the retrospective part of the Act; it is contrary to general principles to do that, and I do not think we ought to say that the Act has any further retrospective effect than is necessary by reason of the words "The increase is .... notwithstanding any agreement to the contrary .... irrecoverable." There is no provision in the Act that increased rent shall not be received; it only says that if there shall be an increase it shall be irrecoverable, which means it shall not be recoverable by action or by distress or any other process. But then it is said that what has been paid by the tenant in excess of the standard rent is really the tenant's money in the pocket of the landlord, it having been paid to him without consideration. In the first place, I think

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it was not paid without consideration until the Act was passed. Until that date there was perfectly good consideration. Nor do I think that it can be otherwise than a payment made after that date by mistake of law. There is no doubt that neither the landlord nor the tenant was aware of the statute. I think it would be impossible, having regard to the language of this Act, for us to say that it imposes upon the landlord any liability to refund in any shape or form the increased rent under an agreement made at a time when it was perfectly lawful to make such an agreement, and when there was no duress or undue pressure. That being so, I think that the decision of the Divisional Court was wrong, and that the appeal must be allowed.

WARRINGTON L.J. I am of the same opinion, and I should add nothing but for the fact that we are differing from the judgment of the Divisional Court.

The defendant was the tenant of a house at a rent of 9*s.* 6*d.* a week, and had been so since November 11, 1907. On or about March 29, 1915, the plaintiffs, the landlords, raised the rent to 10*s.* a week. In effect they gave the defendant to understand that he must either pay the increased rent or give up the house. The defendant agreed to pay the increased rent and became tenant at that higher rent of 10*s.* a week, and he continued to pay that rent until the end of January, 1916. Meanwhile on December 23, 1915, the Act "to restrict in connection with the present war the increase of rent of small dwelling-houses and the increase of the rate of interest on and the calling in of securities on such dwelling-houses" was passed, and stating it generally the effect of the first section was to make any increase of rent becoming due upon or after November 25, 1915, irrecoverable. Accordingly those payments of rent which the defendant had made since November 25, 1915, were payments which, if he had not made them, could not have been recovered by the landlord by any legal process. But the Act did no more. It in no way invalidated the previously perfectly lawful agreement to pay the extra rent. All that it provided was that where the rent has been increased under circumstances applicable to the present case the amount by which the rent exceeds what is called the standard rent, in this case 9*s.* 6*d.* a week, shall,

notwithstanding that agreement, be irrecoverable. It did no more than that. So far then as the Act is concerned there is nothing in it which would entitle the defendant to recover the excess rent which he had so paid or to deduct it from his future rent. But he says if there is nothing in the Act to that effect, still I am entitled to recover it by the principle of common law. The answer to that is that these several sums of 6*d.*, amounting altogether to 5*s.*, are payments which he has made quite voluntarily, and the only mistake he has made is that he has made them under the belief that he could not by law refuse to pay them, and that if he did not pay them the landlord could recover them. As to the first period, from November 25 to December 23, that belief was a true belief, because at the time he paid them it was true. They became irrecoverable only after the Act was passed. He has paid the sums sued for voluntarily in the belief that if he did not pay them an action might be brought for their recovery. That belief was unfounded, but his mistake was a mistake as to law, not a mistake as to fact. Then it is said that he made the payments under unlawful pressure. I confess I cannot follow that. The only pressure that was put upon him was such pressure as was exercised in March, 1915, long before the passing of the Act, when he was asked to agree to pay the extra rent or to leave the house. All he did was to continue to pay the rent in the ordinary way in which he had agreed to pay and intended to pay. It seems to me there was no pressure after the passing of the Act to force him to pay money which could not otherwise be recoverable. With all respect, I think the judgment of the Divisional Court was misdirected and ought to be reversed.

SCRUTTON L.J. As we are differing from the Court below, I will express my judgment in my own words.

In March, 1915, there was a tenant of a small house in Birmingham at a rent of 9*s.* 6*d.* a week. In that month the landlord was desirous of raising the rent and said to the tenant "You must pay 10*s.* a week or leave the house." The tenant preferred to pay 10*s.* a week rather than leave the house, and agreed to do so. In a sense the tenant was induced to do that by the fear of being turned out, but it was a fear which the landlord had a perfect right to make use of. The landlord was entitled to say "I will not let you the house except

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at an increased rent," and that agreement was not open to any objection and was a perfectly legal one. The tenant continued to pay 10*s.* a week rent to the landlord up to the end of January, 1916, neither party knowing of any good reason why that agreement should not be carried out. But at the end of January, 1916, both parties discovered that without their knowledge an Act of Parliament had been passed, the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, which was apparently introduced on November 25, and came into operation on December 23, 1915. The object of that Act was that after November 25, 1915, no sum should be recoverable as rent for a house beyond what was called the standard rent, which was the rent at which the house was let on August 9, 1914. It is a little curious, but I desire always to remember that it is much easier to criticize at one's leisure an Act of Parliament which has been drafted in haste than it is to draft an Act one's self, and it is quite possible that if I had been applied to in a great hurry by a Minister to draw this Act I might have made a much worse hand at it than the draftsman did; but what the draftsman said was this, that the increase should be irrecoverable; he did not make the contract to pay a higher rent illegal. He did not deal with the case where the rent was paid by consent at a higher rate. Only in one case did he give a right to recover back, and that was in the case where the landlord required "the payment of any fine, premium, or other like sum in addition to the rent."

Now, construing the Act on the principle laid down by Lindley L.J. in *Lauri* v. *Renad* (1), "It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary," I find nothing in the language of this Act to compel me to give a more retrospective effect to it than this, that, as to the rent that accrued between November 25 and December 23, if not paid it shall not be recoverable by the landlord by any process of law. I find nothing, therefore, in the Act which enables the tenant who has paid by

(1) [1892] 3 Ch. 402, 421.

mistake rent in excess of the standard rent to recover it back. All that I find is that the landlord cannot recover it if the tenant has not paid. The county court judge took the view that the case came within the express provisions as to recovery under s. 2, which does provide that amounts overpaid shall be recovered by the tenant. The words are "fine, premium, or other like sum in addition to the rent," and the county court judge said that this increase of rent was an addition to the rent and came within the words of the section "other like sum." The Divisional Court disagreed with him, and I respectfully disagree with him too, for he seems to have given no suitable meaning to the words used and to have entirely overlooked the doctrine of ejusdem generis. But if I understand the judgment of Avory J., with the result of which Ridley J. concurs, he thought that not only under the section, but under common law principles which date back to *Moses* v. *Macferlan* (1), the money is recoverable because it was paid in some illegal way, and therefore is held for the benefit of the person who paid it. On the facts I have stated the money was paid under a perfectly legal contract, and while it is true that it was continued to be paid at a time when the sum had become irrecoverable by law, neither party knew of this, and neither party put any pressure on the other to continue to pay. Under these circumstances it seems to me the right to repayment does not come within any of the common law doctrines; and it is not conferred by the express words of the Act; and for these reasons I think that the sum cannot be recovered by the tenant, the loss must lie where it falls, and the judgment of the Divisional Court should be reversed.

WARRINGTON L.J. There is one thing I forgot to mention in my judgment, and that is that I entirely agree with the Divisional Court as to s. 1, sub-s. 2.

LORD COZENS-HARDY M.R. And so do I.

Solicitors for appellant: *Peter Thomas & Clark, for Jeffery, Wild & Lovatt, Birmingham.*

Solicitors for respondent: *Beckingsale & Co., for Duggan & Elton, Birmingham.*

(1) (1760) 2 Burr. 1005.

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Feb. 6, 8; *March* 2.

[IN THE COURT OF APPEAL.]

PRICE *v.* GUEST, KEEN & NETTLEFOLDS, LIMITED.

Employer and Workman—Accident—Death—Compensation—Mode of calculating—Continuity of Employment—Strike—One Week's Absence from Work—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched.* I., *par.* 1 (*a*).

A workman met with his death by accident on March 10, 1916, while employed in a colliery belonging to the appellants. He had been in the employment of the appellants for many years in the same grade. On July 12 a strike was declared by the miners as from July 14. On July 13 a Proclamation was made under the Munitions of War Act, 1915, the effect of which was that any man taking part in a strike would be guilty of an offence and liable to a fine. Notwithstanding the Proclamation the men, including the deceased, ceased work on July 15, and remained out until the 22nd, when the strike was ended by the intervention of the Government and work was resumed under a fresh agreement dating back as from July 15. On a claim for compensation by the man's dependants under the Workmen's Compensation Act, 1906:—

Held, that the abstention from work during the week of the strike did not constitute a break in the employment, nor was it an "absence from work due to illness or any other unavoidable cause" within Sched. I., par. 2 (*c*).

Held, therefore, that the compensation must, under par. 1 (*a*) (i.) of the schedule, be calculated on the basis of the man's actual earnings during the three years next preceding the accident.

Jones v. *Ocean Coal Co.* [1899] 2 Q. B. 124 distinguished.

APPEAL from an award of the judge of the Merthyr Tydfil County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

David Price was at the time of his death, and had for many years previously been, in the employment of the appellants, Messrs. Guest, Keen & Nettlefolds, Limited, in the same grade at one of their collieries. The terms of his service were regulated by the Conciliation Board agreement dated April 8, 1910, under which practically the whole of the South Wales collieries were worked. That agreement terminated by notice on June 30, 1915, from which date the workmen as a body continued to work "from day to day" pending the result of final negotiations for a new working agreement. On July 14 all the men, except certain classes not including Price,

came out on strike notwithstanding a Proclamation had been made on July 13 under the Munitions of War Act, 1915, which rendered such a strike illegal and the men taking part in it guilty of an offence under the Act and liable to a penalty. On July 21, through the intervention of the Government, a provisional agreement was made between the employers and the men, and on July 22, the men, including Price, returned to work and continued to work for the appellants until his death. The negotiations for a settlement proceeded, and ultimately a new Conciliation Board agreement dated September 2, 1915, was signed. This agreement was made retrospective as from July 15, 1915.

On March 10, 1916, Price was killed by an accident arising out of and in the course of his employment, and his dependants claimed compensation under the Act. The employers admitted liability, the only question between the parties being as to the mode of assessing the amount of the compensation. The employers contended that it ought to be assessed on the footing that Price had been in their continuous employment during the three years next preceding his death, while the applicants contended that by absenting himself from work during the week from July 15 to 22 he had broken the continuity of his employment, and the compensation ought to be assessed on the footing that the period of his employment with the same employers was less than three years. The county court judge took the latter view, holding that Price's absence for seven days had put an end to the relation of master and servant, and he made an award for 300*l.* It was agreed that if the former method of assessment were the proper one the amount of the compensation would be 259*l.* 4*s.* The employers appealed.

Parsons, K.C., and *C. B. Guthrie* (*Rowland Thomas* with them), for the appellants. In *Greenwood* v. *Joseph Nall & Co.* (1) the House of Lords preferred the view taken by Fletcher Moulton L.J. in *Perry* v. *Wright* (2) as to the reading of the Act to that of the Master of the Rolls. But that decision is not helpful in the present case, because it dealt with interruptions in the employment due to illness or other unavoidable cause ejusdem generis. Here the interruption in the employment was entirely voluntary on the

(1) [1917] A. C. 1. (2) [1908] 1 K. B. 441.

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part of the workman; it was in no sense unavoidable. On the contrary, it was illegal. The commission of an act which is illegal cannot be said to be unavoidable. [They also referred to *Carter* v. *John Lang & Sons.* (1)]

Although the terms of the employment may vary, yet if the employment is substantially continuous it may still be employment by the same employer within par. 1 (*a*) (i.) of the schedule. Having regard to par. 2 (*c*), no variation except change of grade will break the continuity of the employment. The county court judge considered himself bound by *Jones* v. *Ocean Coal Co.* (2) But there the absence from work was for a period of five months. What happened in this case did not constitute a break in the continuity of the employment. Apart from par. 2 (*c*) of the schedule the workman was continuously employed by the same employers for a period of three years next preceding the injury which caused his death within par. 1 (*a*) (i.). On July 15 his employment was interrupted by his own act. The Government by the Proclamation prohibited the termination of the employment. [They referred to the Munitions of War Act, 1915 (5 & 6 Geo. 5, c. 54), ss. 1, 2, 3, 14, 19 (*b*).]

When the Proclamation was issued it created for a period of twenty-one days a statutory obligation to work—in other words, a statutory contract with the employers. The statutory obligation to continue working bridged the gap in the continuity of the employment. The employers might have terminated the contract, but as they did not do so the service continued. The employers could not terminate it while the Proclamation was in force. In any view the cessation from work for a week did not break the continuity of the employment as in *Jones* v. *Ocean Coal Co.* (2) It was substantially continuous. It would be contrary to the spirit of the Act to hold that a trivial cessation from work such as took place here constituted a break in the employment. Lord Shaw in *Greenwood* v. *Joseph Nall & Co.* (3) thus puts the test: "The question to be put is: Has the workman been employed by the same employer in the same grade during the period of three years: which employment has not been interrupted by absence owing to sickness or other unavoidable cause? If these things, (1.) employ-

(1) (1908) 45 S. L. R. 938. (2) [1899] 2 Q. B. 124.
(3) [1917] A. C. 1, 11.

ment by the same employer, (2.) in the same grade, and (3.) uninterruptedly for three years, can each and all be affirmed, then par. 1 (*a*) (i.) applies ; not so, if they cannot be so answered." In this case all those questions should be answered in the affirmative.

W. Llewelyn Williams, K.C., *Meager*, and *F. Van den Berg*, for the respondent. The county court judge was right in holding that he was bound by *Jones* v. *Ocean Coal Co.* (1) Whether there has been a break in the continuity of the employment is a question of fact for the county court judge : *Giles* v. *Belford, Smith & Co.* (2) The real question is whether there was some substantial time during which there was a cessation of the relation of master and servant : *Appleby* v. *Horseley Co.* (3) If necessary, we submit that the man was prevented from working by an "unavoidable cause."

Par. 2 (*c*) is not exhaustive. The Court will give a wider interpretation to the words than that indicated by the dictum of Fletcher Moulton L.J. in *Perry* v. *Wright.* (4) The effect of the Munitions Act is this : If a body of workmen as the result of a concerted movement refuse to go to work they are subject to penalties on the prosecution of the State. No statutory contract is imposed by the Act. If an offence is committed there is liability to a fine, but that cannot alter the fact that the relationship of master and servant was severed. The man was not in fact in the employment of the appellants during the week of the strike. The case is really covered by *Jones* v. *Ocean Coal Co.* (1) There was complete cessation of the relation of master and servant. The resumption of work was under a fresh agreement, upon fresh terms. Therefore, however short the absence from work, there was a break in the continuity of the employment within the Act.

Parsons, K.C., in reply. A man though temporarily absent from work may still be in his master's employment. It is said that the question as to the continuity of the employment is one of fact for the county court judge. But when the facts are not in dispute the proper inference to be drawn from them is a question of law. The county court judge has held himself bound by *Jones* v. *Ocean Coal Co.* (1), and it is submitted that he has misunderstood that case. Par. 2 (*c*) provides that a change of grade shall

(1) [1899] 2 Q. B. 124.
(2) [1903] 1 K. B. 843.
(3) [1899] 2 Q. B. 521.
(4) [1908] 1 K. B. 441.

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constitute a break in the employment; that implies that nothing else does.

Cur. adv. vult.

March 2. LORD COZENS-HARDY M.R. In this case I have felt great difficulty in arriving at a conclusion satisfactory to my own mind, partly because of the obscurity of s. 1 of the First Schedule to the Act, and partly because of the insufficiency of the facts found by the county court judge. [The Master of the Rolls stated the facts substantially as above set out and continued:]

Some points may, I think, be considered to be settled by authority binding upon this Court.

(1.) Employment for three years by the same employer must be substantially continuous employment. This was decided under the Act of 1897 in *Jones* v. *Ocean Coal Co.* (1); and it was assumed under the Act of 1906 by the House of Lords in the recent case of *Greenwood* v. *Joseph Nall & Co.* (2)

(2.) An employment may be continuous although wages may be increased or diminished, and the conditions of service as to notice and otherwise may be varied. I see no reason to doubt that Price's employment was continuous up to July 14 at least.

(3.) A contract of service is not at common law terminated by incapacity to work by reason of temporary illness: see the recent decision of this Court in *Warburton* v. *Co-operative Wholesale Society* (3), following *Cuckson* v. *Stones.* (4)

(4.) A contract of service is not terminated by voluntary absence, although such absence may be a justification for a discharge. Among colliers "St. Monday" is a popular saint.

(5.) In the absence of notice by either master or servant, there must be some act inconsistent with the continued existence of the relation of master and servant—for example, going to work for another master.

(6.) The definition in Sched. I., par. 2 (*c*), has the effect of causing absence due to illness or "other unavoidable cause" to be a break in the employment for the purpose of s. 2: *Greenwood* v. *Joseph Nall & Co.* (2) In the present case absence from July 14 to July 22

(1) [1899] 2 Q. B. 124.
(2) [1917] A. C. 1.
(3) Ante, p. 663.
(4) (1858) 1 E. & E. 248.

was not due to illness or other unavoidable cause; it was voluntary absence, and doubtless due to concerted action on the part of Price and fellow-workmen.

We are left in the dark as to the conditions of the "day to day" working. I think it is fair to assume that some reasonable notice on one side or the other was necessary to terminate the engagement, probably a day's notice. There is no evidence that any such notice was given. Nor is there any evidence that any notice was given after July 14, or that there was any act, except voluntary absence from the colliery from July 14 to July 22, which would terminate the contract of service, which in my view continued at least up to July 14.

It was stated by counsel that negotiations for a modification of the Conciliation Board agreement were being actively carried on during all this period up to July 22, and the concerted absence from work was no doubt a move in the game. Pending these negotiations the masters would not be likely to assert their right to terminate all the employments. It is important to observe that the final agreement of September was expressly made to date back as from July 15. This is almost, if not quite, a recognition that the employment had not been terminated by what took place on July 15.

It is unfortunate that there is no evidence of the terms of Price's admitted employment, either as to the amount of wages or as to payment by time or by piece work. This applies both during the "day to day" period and before that period.

The learned county court judge has held, as a matter of law, that absence for seven days put an end to the relation of master and servant, and that *Jones* v. *Ocean Coal Co.* (1) disposes of the case. I think something more is needed to justify that conclusion as a matter of law. There is no evidence to support the conclusion as a matter of fact. And even if there had been such evidence, I am disposed to think that the service would have been "substantially continuous" within the neaning of *Jones* v. *Ocean Coal Co.* (1)

Upon the whole I think it is apparent that the learned county court judge acted upon a wrong view of the law, and that his award cannot stand. The amount payable to the dependants must be

(1) [1899] 2 Q. B. 124.

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his actual earnings during three years prior to the death. That amount, as appears from the judge's notes, was agreed at 259*l.* 4*s.* This figure must be inserted in the award instead of 300*l.*

WARRINGTON L.J. One David Price, a workman in the employment of Guest, Keen & Nettlefolds, Limited, on March 10, 1916, suffered injury by accident arising out of and in the course of his employment and died the same day. His dependants claim compensation, liability is admitted, and the only question to be determined is whether the compensation ought to be assessed on the footing that the man had been in the employment of the same employers during the three years next preceding the injury, or on the footing that the period of the workman's employment by the employers was less than the said three years.

If the compensation is assessed on the latter footing it is somewhat larger than if it be assessed on the other footing.

The county court judge has adopted the mode of assessment more favourable to the workman, and the employers appeal. The facts are as follows : [The Lord Justice stated them and continued :]

The question is, was Price in the employment of the appellants "during the three years next preceding the injury" ?—Workmen's Compensation Act, 1906, Sched. I., par. 1 (*a*) (i.). It was held in *Jones* v. *Ocean Coal Co.* (1) (a case arising under the Workmen's Compensation Act, 1897, which contained a provision in all material respects for the present purpose the same as the provision in the existing Act referred to above) that the employment contemplated is a continuous employment during the period in question, that is "a continuous relationship of master and servant": per A. L. Smith L.J. (2) Romer L.J. adds the further qualifying word "substantially." He says (3) "the employment is intended to be a substantially consecutive or continuous employment—that is to say, that to satisfy that part of the clause the workman must have been in a substantial sense in the same employment during" the relevant period. Vaughan Williams L.J. took, I think, the same view as to the qualification "substantially"; certainly Romer L.J. so understood his judgment.

[(1) [1899] 2 Q. B. 124. (2) Ibid. 127. (3)] Ibid. 130.

In that case it was proved that the contract of service was effectually and completely terminated on March 31, 1898. From that date the man in question was not in the service of the employers in any sense until he returned to their employment under a fresh contract of service on September 12, 1898. In the present case the county court judge has found that during the seven days the men were away the relationship of master and servant did not exist, and thought that on that footing the principle of *Jones* v. *Ocean Coal Co.* (1) applied, and accordingly held that Price had been in the employment of the appellants from July 22, 1915. Even if the finding of fact be correct—and if there is evidence to support it we are bound by it—I should be prepared to hold that under the circumstances of this case, notwithstanding the seven days' absence from work, there was a substantially continuous employment by the same employers. But I do not base my decision on that ground, for I think there was no evidence on which the judge could properly find that the old employment was completely determined until it was superseded by the new employment commencing on July 22.

There was no evidence of any stipulation or of any custom dispensing with notice to terminate the contract involved in the "day to day" working, and the Court in such a case is not entitled to assume that the contract is terminable without the reasonable notice which the general law requires. What would be reasonable notice is not for us to determine. It may be that in the case of "day to day" contracts notice given on one day of an intention to determine the contract as from that day might be sufficient, but in this case there was no evidence of any notice at all having been given either by Price or by his employers.

For these reasons, then, I am of opinion that notwithstanding Price's absence from work from July 15 to July 22 he was in the employment of the same employers for three years before the accident in the sense that there was no break in the relationship of master and servant.

But this does not completely dispose of the question. In order to constitute employment for three years within the statute the employment must not only be continuous in the sense mentioned

(1) [1899] 2 Q. B. 124.

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above, but it must satisfy two further conditions—it must have been in the same grade in which the workman was employed at the date of the accident, and it must have been uninterrupted by absence from work due to illness or any other unavoidable cause: Sched. I., par. 2 (*c*), as interpreted by the House of Lords in *Greenwood* v. *Joseph Nall & Co.* (1) It is well settled that mere temporary absence from work through illness does not of itself terminate the contract; to have this effect the incapacity must go to the root of the matter and frustrate the object of the engagement: *Cuckson* v. *Stones*. (2) I think par. 2 (*c*) was intended to meet such cases and to make absence from work through illness or any other unavoidable cause effective for the purpose of breaking the period of three years, although in law it might not terminate the contract of service. In the present case, however, there was not, in my opinion, an interruption by an unavoidable cause. There is authority for saying that the cause referred to is one ejusdem generis with illness: *Bailey* v. *Kenworthy* (3); but it is unnecessary in the present case to resort to this doctrine, for in my opinion Price's absence was not due to an unavoidable cause, but to an act of volition on his part. It may be true that if he had gone to work he would have exposed himself to unpleasant consequences, but this is not, in my opinion, sufficient to make his absence other than voluntary. On the whole, then, I am of opinion that the appeal ought to be allowed and an award made on the footing that the workman was in the employment of the same employers during the three years next preceding the injury.

A. T. LAWRENCE J. I agree. This case raises a question as to the mode of computing the compensation payable to the representatives of a workman under the Workmen's Compensation Act, 1906.

The employers contend that the amount should be a sum equal to the actual earnings during the three years prior to the accident. The widow of the deceased, who is the claimant, contends that the amount should be arrived at by multiplying by 156 the average weekly earnings at the date of the accident.

(1) [1917] A. C. 1. (2) 1 E. & E. 248.
(3) [1908] 1 K. B. 466.

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The facts of the case are these: [The learned judge stated them and continued:] The question here is whether this strike or cessation of work between July 14 and July 22 constitutes such an interruption of employment as to entitle the applicant to the method of computation for which she contends. The learned county court judge has held that it does, basing his judgment upon *Jones* v. *Ocean Coal Co.* (1) In that case the facts were different; the contract of employment was duly determined, for the employers there accepted the notice of the workman and themselves gave notice terminating the employment of the individual workmen. Here there was no such notice, but the employers continued ready and willing to receive the men, the pits were kept ready in working order, and the negotiations for a new Conciliation Board agreement proceeded throughout the seven days in question. Although between June 30 and July 14 there existed no Conciliation Board agreement, work continued from day to day. Such an agreement as the Conciliation Board agreement is not an essential of employment; in many employments the measure of remuneration is "per day," and the payments are made weekly or at some other customary periods, as was the case here. Colliery workmen constantly abstain from working one or more days each week; this does not constitute an interruption of the "employment." Even where the abstention from work is so prolonged as to give the employer a right to treat it as a breach going to the root of the contract of employment and to entitle him to rescind, it does not terminate the contract, unless the employer does some act from which an intention to rescind can be inferred. In this case the absence from work was so prolonged, and took place under such circumstances, that doubtless the employers would have been entitled to rescind had they been so minded, but apparently they were not. The breach of a contract does not ipso facto put an end to the contract: it gives a cause of action, and it may give a right to the other side to put an end to the contract; whether it does so will depend upon the facts of the particular case. The learned county court judge appears to have regarded the workman between July 1 and 14 as making a new contract with his employers each "shift"; there was no evidence of this, and I do not think it is the proper inference to draw from

(1) [1899] 2 Q. B. 124.

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the fact that the men worked "day to day." Colliers often come long distances to their work, and, though it may be difficult to say what would be a reasonable notice to a man working day work, I think it clear that the employer would not be giving him a reasonable notice if he discharged him arbitrarily upon his arrival at the pit. For these reasons I think the learned judge was wrong in holding that the "employment" terminated when the men left work without notice on July 14. The further question raised is whether the strike was an "absence from work due to illness or any other unavoidable cause" within par. 2 (*c*) of the First Schedule to the Act. I think it was not. It was clearly not illness or ejusdem generis to illness, if that be the proper test; moreover, it does not seem to me that there was any evidence that it was "unavoidable." There is no evidence that the deceased man was constrained in any way to abstain from work; he may, for aught that appears, have been a promoter of the strike. It seems to me impossible that the law should intend that conduct which is illegal in the sense that it subjects the person to a penalty, and which is regardless of the interests of the State, is "unavoidable." It is quite true that the coercion of individuals by strikers is often cruel and remorseless, as has frequently been proved before me in criminal cases; but for the existence of a strike to afford an excuse for absence from work as being "unavoidable" within par. 2 (*c*) some pressure must be proved; it cannot be presumed. If the persuasion was "peaceful," the action of the person persuaded must be assumed to have been voluntary and not "unavoidable." A fortiori is this so when the strike is one that has been proclaimed as contrary to law; it cannot be right to presume that disobedience to the King's Proclamation is "unavoidable." I think the appeal should be allowed and the judgment be entered for 259*l.* 4*s.*

Solicitors for appellants: *Ullithorne, Currey & Co., for D. W. Jones & Co., Merthyr Tydfil.*

Solicitors for respondent: *Warren & Warren, for Edward Roberts & Lewis, Dowlais.*

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[IN THE COURT OF APPEAL.]

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Feb. 8, 9; *March* 2.

WATTS *v.* MANCHESTER CORPORATION.

Employer and Workman—Injury by Accident—Incapacity—Compensation—Amount of Weekly Payment—Regard to be had to "payment, allowance, or benefit" received from Employer—Pension payable in respect of Incapacity out of Fund partly provided by Employer—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., clause* 3.

A fireman in the service of the Manchester Corporation Fire Brigade met with an accident by which he was permanently incapacitated. The corporation admitted their liability to pay compensation under the Workmen's Compensation Act, but contended that in fixing the amount of the weekly payment regard ought to be had to a pension to which the applicant was entitled under the corporation superannuation scheme out of the fire brigade fund. This fund was provided partly by the dividends on an invested fund and partly by contributions of the men out of their pay, any deficiency being made up by the corporation out of the city rate. In an arbitration under the Act:—

Held, that so far as the pension was provided for by payments made by the corporation, it was "payment, allowance, or benefit" received from the employers which ought to be regarded in fixing the amount of the weekly payment of compensation under Sched. I., clause 3.

Dictum of Lord Loreburn in *Considine* v. *McInerney* [1916] 2 A. C. 162 explained.

Appeal from an award of the judge of the Manchester County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The question arising on the appeal was whether a pension payable to the applicant in respect of incapacity, caused by an accident which happened to him while in the employment of the respondents, the Manchester Corporation, was a "payment, allowance, or benefit" received from them during the period of incapacity which ought to be regarded to any extent in fixing the amount of the weekly payment of compensation under Sched. I., clause 3, of the Act.

The applicant, William Watts, had since the year 1902 been employed by the Manchester Corporation as a member of the city fire brigade. On October 29, 1915, he sustained personal

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injury by accident arising out of and in the course of his employment. The corporation admitted their liability to pay compensation under the Act. In accordance with the terms of his service a deduction was made from his pay at the rate of 3 per cent. per annum, which was paid into a fund called the Fire Brigade Pension Fund. This fund was established by the Fire Brigade Superannuation (Manchester) Order, 1891, as confirmed by the Fire Brigade Superannuation (Manchester) Provisional Order Confirmation Act, 1891, under which the corporation, as the Manchester police authority, adopted the provisions of the Police Act, 1890. Under this Act the applicant was, in the event which had happened, entitled to a pension of 9*s.* 6*d.* a week payable out of the Fire Brigade Pension Fund.

It appeared from a statement of account of the pension fund, submitted by the chief accountant in the city treasurer's department, that for the year ending March 31, 1916, the total payments out of the fund amounted to 2073*l.* 11*s.* 11*d.* The receipts comprised—dividends on invested capital, 90*l.* 13*s.* 2*d.*; deductions from pay, 333*l.* 15*s.* 7*d.*—making together 424*l.* 8*s.* 9*d.*, leaving a deficiency of 1649*l.* 3*s.* 2*d.*, which was made good by a transfer from the city rate.

The county court judge held, on the authority of a dictum of Lord Loreburn in *Considine* v. *McInerney* (1), that in fixing the amount of the weekly payment he ought not to regard the pension at all. The man's wages at the time of the accident were 2*l.* 14*s.* 10*d.* a week. He was now able to earn 1*l.* 5*s.* a week, making a loss in earning capacity of 1*l.* 9*s.* 10*d.* a week. The county court judge awarded a weekly payment of half this amount, namely, 14*s.* 11*d.* In the event, however, of a successful appeal from his decision he awarded by way of alternative a weekly payment of 10*s.* The corporation appealed.

Eastham, for the appellants. This pension is clearly a "payment, allowance, or benefit" received from the employers and ought to be regarded in fixing the amount of the weekly payment of compensation under Sched. I., clause 3. That clause was considered in *McDermott* v. *Owners of S.S. Tintoretto* (2), where Lord Lore-

(1) [1916] 2 A. C. 165. (2) [1911] A. C. 35, 39.

burn L.C. said: "It is not every payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity that the county court judge must have regard to. It is only such as are received in respect of the incapacity, and received in respect of that period of it which is covered by the compensation." In this case both those conditions are fulfilled. The facts here bring the case within the observations of Lord Atkinson in *Considine* v. *McInerney* (1), where he alludes to the case of an insurance effected for the workman's benefit at the joint expense of his employer and of himself, and expresses the view that in such a case the expenditure on the part of the employer should to some extent be had regard to under Sched. I., clause 3. Lord Shaw expresses a similar opinion. (2) Those dicta support my contention. Lord Loreburn L.C., however, said (3): "If a payment or pension came from a fund to which the employers had contributed it would not be a payment from those employers at all. The money they had contributed would be no longer their money and it could not be so regarded by the arbitrator." Lord Loreburn was there thinking of an employer subscribing to a charity or fund from which the workman might receive a benefit. That, of course, would not have to be regarded. Here from 75 to 80 per cent. of the pension comes from the employers' resources, and it is no less a "payment, allowance, or benefit" received from the employers because a part of it is attributable to the contributions of the workman. [He also referred to *Kempson* v. *Owners of S. Moss Rose.* (4)]

Shakespeare, for the respondent. In *Considine* v. *McInerney* (5) two things are clear—(1.) there was no legal right to the pension; and (2.) there was no contribution by the workman at all. It is not disputed here that the man is entitled to the pension, and that he has contributed weekly to the fund. Each year when the employers make up the deficiency in the fund their contribution is no longer their money; it is part of the fund, and in case of an accident in respect of which a pension becomes payable the employers do not provide anything; it comes out of the fund, including their

(1) [1916] 2 A. C. 176.
(2) Ibid. 180.
(3) Ibid. 173.
(4) (1910) 4 B. W. C. C. 101.
(5) [1916] 2 A. C. 162.

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contribution with which they have parted. I rely on Lord Loreburn's dictum. Apart from that case, however, where there is a contractual right in the workman to a payment the employer cannot claim to have it regarded under par. 3: *McDermott* v. *Owners of S.S. Tintoretto.* (1) It makes no difference if the fund is contributed to by the employer. Where between the employer and the workman a fund is interposed a payment out of the fund is not within the Act. If the payment comes direct from the employer, of course it must be regarded.

Eastham in reply.

Cur. adv. vult.

March 2. LORD COZENS-HARDY M.R. Watts was appointed in 1902 a member of the Manchester Fire Brigade. He signed conditions of service which stated that "pensions and gratuities are granted to the firemen" according to a Provisional Order Confirmation Act, 1891, and that "a deduction at the rate of 3 per cent. per annum on all pay will be made and paid into the Fire Brigade Pension Fund." This pension fund is fed each year (1.) by the dividend on an invested fund, the origin of which is explained by recitals in the Provisional Order of 1891; (2.) by the 3 per cent. deductions from the firemen's pay; and (3.) by payments out of the city rate of the deficiency. The result is that roughly four fifths of the pensions are paid by the corporation. On October 29, 1915, Watts suffered personal injury by accident arising out of and in the course of his employment as a fireman, his thigh being fractured. On May 31, 1916, the fire brigade surgeon gave a certificate that he was incapacitated from the performance of his duty, and that the incapacity was likely to be permanent. This certificate entitled him to a pension of 9*s.* 6*d.* a week out of the pension fund, and he is now in receipt of this pension. Watts applied for compensation. Liability is admitted; and the only question raised is whether under clause 3 of Sched. I. this pension ought to be regarded in fixing the amount of the compensation. The material words of clause 3 are as follows: "In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from

(1) [1911] A. C. 35.

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the employer during the period of his incapacity." It is not contended that, so far as the pension can be said to have been provided otherwise than by the corporation, it ought to be regarded.

The Fire Brigade Pension Fund is a statutory fund, not in the sense that there is any special investment in particular securities, but in the sense that the corporation is bound to provide each year the cash required to make good the money due to the pensioners.

Apart from authority, the case seems to me to fall within the language of clause 3. There is no authority except *Considine* v. *McInerney*. (1) There is nothing in that decision which makes it applicable to the present case. There the injured man had, not any contractual right to a pension, but a reasonable expectation that he would receive a pension. The pension, if paid, would be payable solely by the employers. The House of Lords held that it was within clause 3. There are, however, some observations of the noble Lords which require our attention. Lord Loreburn said: "If a payment or pension came from a fund to which the employers had contributed, it would not be a payment from those employers at all. The money they had contributed would be no longer their money." The county court judge in his very careful judgment treats those observations as governing the present case. But I think Lord Loreburn was dealing with a wholly different case, namely, where an employer, not under any obligation to pay, subscribes to a charity the managers of which decide to grant a pension. On the other hand, Lord Shaw, in perfectly clear language, puts the present case, and treats it as within clause 3. He says: "There are, however, two other stages, my Lords, which can be set out: (1.) The payment, allowance, or benefit may come out of a fund to which both workman and employers have in the past contributed. This is by no means an uncommon case. On the contrary, I believe it to be not infrequent. (2.) There is the case where a scheme of payment, allowance, or benefit is wholly set up by or on behalf of the employers. It is in my humble opinion the duty of the arbitrator, in both of these cases, to have regard to the payments, allowances, or benefits." Then he goes on to say why he comes to that clear conclusion and

(1) [1916] 2 A. C. 162, 173, 180.

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explains the reasons for doing so. And Lord Atkinson is scarcely less explicit. There is nothing in *Considine* v. *McInerney* (1) which fetters me, and I am free to decide this appeal as seems to me right.

The county court judge has very conveniently said to what extent he would have regard to the pension, if he ought to regard it at all.

The appeal must be allowed, and the compensation reduced from 14*s*. 11*d*. to 10*s*.

WARRINGTON L.J. (after stating the facts and the question to the same effect). The county court judge has held that in this case the workman does not receive from his employer a payment, allowance, or benefit to which regard ought to be had in fixing the amount of the weekly payment, and has awarded compensation on that footing. He has, however, in the event of this Court being of a different opinion, determined the amount by which the compensation ought to be reduced in consideration of the pension, and the only question, therefore, for this Court is one of principle, namely, whether regard ought to be had to the pension.

The pension is clearly payable by reason of the incapacity and during the incapacity, for it is payable during the rest of his life. It would seem at first sight that so far as the pension is provided for by payments made by the corporation it is a payment received from the employers.

The county court judge, however, thought the case was covered by a dictum of Lord Loreburn in *Considine* v. *McInerney*. (2) I think the judge has mistaken Lord Loreburn's meaning; he was not, in my opinion, thinking of a case like the present, in which the pensions are actually provided by a payment direct from the employers, but of a case in which the employers merely subscribe to a fund out of which pensions are paid. However, Lord Atkinson and Lord Shaw make it quite plain that in their view such a payment as that in the present case would be within the Act. Under these circumstances I am free to express my own view, which is in agreement with that of Lord Atkinson and Lord Shaw. It was said that the payment, to be within the Act, must be voluntary. There is

(1) [1916] 2 A. C. 162, 173, 180. (2) [1916] 2 A. C. 162, 173.

no authority for that view, and the opinion expressed by Lord Loreburn in *Considine's Case* (1) is opposed to it.

On the whole I am of opinion that the appeal must be allowed, and an award made for the sum fixed by the county court judge as the proper sum after having regard to the pension.

A. T. LAWRENCE J. (after recapitulating the facts). The pension scheme is constituted by the corporation under the provisions of the Police Act, 1890, and the Fire Brigade Superannuation (Manchester) Order Confirmation Act, 1891.

By the fireman's contract of service a deduction of 3 per cent. per annum is made from his wages. A document from the chief accountant of the city treasurer's department that was put in appears to show that the pensions are contributed from three sources—(1.) dividends on invested capital, (2.) the 3 per cent. deductions from pay, and (3.) a payment by the corporation from the city rate. This corporation contribution forms from 70 to 80 per cent. of the whole, and makes good whatever balance may be needed beyond that which is available from items (1.) and (2.).

The learned county court judge attached considerable importance to the fact that a portion of the income was derived from investments. I do not myself attribute importance to this. It seems to me to have arisen when in 1891 the fire brigade was separated from the police for the purpose of superannuation, and the share of the fire brigade in the then investments was adjusted at a sum of 2960*l.* (see the Provisional Order Confirmation Act, art. 1 (2.)). There is nothing to show to what extent these investments were the result of corporation moneys. The pension is clearly a term of his service, and upon superannuation or incapacity the fireman becomes entitled to a pension in accordance with the scale.

The applicant contends that it should be disregarded as irrelevant to the compensation under the Workmen's Compensation Act. The corporation contend that some regard should be had to it, not necessarily for deduction as a concrete figure, but as a relevant fact and within the words of clause 3 of Sched. I.

It was argued for the applicant that the case was within the principle of *McDermott* v. *Owners of S.S. Tintoretto* (2), but I do

(1) [1916] 2 A. C. 173. (2) [1911] A. C. 35.

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A. T. Lawrence J.

not think it is so; the payments made there under the Merchant Shipping Act were not in respect of the incapacity during the period covered by the Workmen's Compensation Act. In this case the payment of the pension falls upon the city rate of the corporation in consequence of the incapacity and during the period in respect of which the compensation is payable from the same source. It is because otherwise the corporation would be contributing twice at the same time towards the same incapacity that I think regard ought to be had to the pension. The Workmen's Compensation Act is a general Act applicable to the whole community; I regard the Fire Brigade Superannuation Confirmation Act, 1891, as one to some extent in pari materia. It is desirable that employers should be encouraged to institute schemes of this kind. If a proper and just regard is not given to the payments made under such a scheme it will discourage their institution. The words of clause 3 of Sched. I. are clearly wide enough to include this pension; it is a "payment, allowance, or benefit" which the workman receives from the employer during the period of his incapacity, and I see nothing in the dicta or in the case of *Considine* v. *McInerney* (1) which obliges me to say that this pension should be wholly disregarded.

The decision of the learned county court judge was, I think, erroneous, and judgment should be entered for his alternative finding of 10*s.* per week.

LORD COZENS-HARDY M.R. The award in this case is in a very convenient form: In the event of the Court of Appeal deciding that in fixing the amount of the applicant's compensation the pension which he receives in respect of the superannuation fund must be taken into account, he fixes the compensation as from August 12 at the sum of 10*s.* a week. I think, therefore, we ought in the present case to declare that in fixing the amount of the applicant's compensation the pension must be taken into account, and then the award will be in the alternative form.

Solicitors for appellants: *Austin & Austin, for P. M. Heath, Manchester.*

Solicitors for respondent: *Grundy, Kershaw & Co., London and Manchester.*

(1) [1916] 2 A. C. 162.

G. A. S.

SHAW & CO. *v.* SYMMONS & SONS.

1917
Feb. 26;
March 2.

[1916 J. 929.]

Contract—Contract to do Work upon Goods and redeliver—Breach—Goods burnt by accidental Fire on Contractor's Premises—Liability—Fires Prevention (Metropolis) Act, 1774 (14 *Geo.* 3, *c.* 78), *s.* 86.

The plaintiff entrusted books to the defendant, a bookbinder, to be bound under a contract to deliver them when bound to the plaintiff within a reasonable time as and when required by him. The plaintiff having required the defendant to deliver the whole of the books then bound, the defendant failed to deliver them within a reasonable time, and they were subsequently burnt in an accidental fire on his premises :—

Held, that the defendant was liable in damages for the loss of the books; and that he was not absolved by the provision in s. 89 of the Fires Prevention (Metropolis) Act, 1774, that no action shall be maintained against any person in whose house or building any fire shall accidentally begin, nor shall any recompense be made for any damage suffered thereby, any law, usage, or custom to the contrary notwithstanding.

ACTION tried before Avory J. without a jury.

The plaintiffs sued the defendants, bookbinders in London, to recover damages for the loss of books which they had entrusted to the defendants to be bound, the books having been burnt in an accidental fire on the defendants' premises. (1) The facts are fully stated in the judgment.

(1) The Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3, c. 78), s. 86: "No action, suit, or process whatever shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall . . . . accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby; any law, usage, or custom, to the contrary notwithstanding: And in such case, if any action be brought, the defendant may plead the general issue, and give this Act, and the special matter in evidence, at any trial thereupon to be had . . . .; provided that no contract or agreement made between landlord and tenant shall be hereby defeated, or made void."

[Notwithstanding the present statutory short title, this section is not confined to the local limits mentioned in the original full title of the Act, but is of general application: *Filliter* v. *Phippard* (1847), 11 Q. B. 347.]

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E. Pollock, K.C., and *Wallington*, for the plaintiffs.

A. Powell, K.C., and *A. M. Latter*, for the defendants. The arguments sufficiently appear in the judgment. In addition to the cases there cited, the following cases were referred to :—*Maving* v. *Todd* (1) ; *Syred* v. *Carruthers* (2) ; *Sharp* v. *Powell* (3) ; *Walker* v. *Maitland* (4) ; *Romney Marsh Bailiffs* v. *Trinity House* (5) ; *Briddon* v. *Great Northern Ry. Co.* (6) ; *Taylor* v. *Great Northern Ry. Co.* (7) ; *Filliter* v. *Phippard* (8) ; *Nitrophosphate, &c., Co.* v. *London and St. Katharine Docks Co.* (9) ; *Lepla* v. *Rogers* (10) ; *The Notting Hill.* (11)

Cur. adv. vult.

March 2. AVORY J. (12) The material facts upon which the questions in this case depend are that the plaintiffs, who are publishers, entrusted to the defendants, who are bookbinders, books to be bound under contract to deliver them when bound to the plaintiffs as and when required by the plaintiffs, and it was a term of the contract that all books ordered to be bound and not delivered should be charged against the plaintiffs at the expiration of one year from the 1st of the month following the date of the order. No time was specified for delivery, and I hold that the defendants were bound to deliver within a reasonable time after the order for delivery of bound books. On January 7, 1916, the plaintiffs requested the defendants to deliver to them the whole of the books then bound in stock which the defendants had charged against the plaintiffs in accordance with the above-mentioned term of the contract, and I find as a fact that between January 7 and 20 the plaintiffs on two occasions telephoned to the defendants pressing for delivery. On January 20 a fire occurred on the defendants' premises, which was accidental and not due to any negligence on the part of the defendants, and the plaintiffs' books included in the last-mentioned order were wholly or partially destroyed or damaged in the fire, and the defendants in consequence failed to deliver them to the plaintiffs.

(1) (1815) 4 Camp. 225.
(2) (1858) E. B. & E. 469.
(3) (1872) L. R. 7 C. P. 253.
(4) (1821) 5 B. & Al. 171.
(5) (1870) L. R. 5 Ex. 204.
(6) (1858) 28 L. J. (Ex.) 51.
(7) (1866) L. R. 1 C. P. 385.
(8) 11 Q. B. 347.
(9) (1878) 9 Ch. D. 503.
(10) [1893] 1 Q. B. 31.
(11) (1884) 9 P. D. 105.
(12) The judgment was written.

Mr. Pollock, on behalf of the plaintiffs, based their claim on a breach of the contract to deliver within a reasonable time. For this reason I do not deal with the alternative claim for detention or with the evidence as to a subsequent sale by auction of some of the plaintiffs' goods, which formed part of the salvage stock.

Mr. Powell, for the defendants, contended: (1.) that there was no breach of the contract to deliver within a reasonable time; (2.) that, even if there was a breach, the defendants were not insurers, and further were protected by the notice upon their invoices and letter paper that they would not be answerable for loss or damage by fire; (3.) that the breach of contract was not the proximate cause of the loss, or that the damage did not naturally flow from the breach of contract; and (4.) that in any event the defendants were absolved from liability by the Fires Prevention (Metropolis) Act, 1774.

A consideration of the evidence as to the time taken in delivery on previous occasions, particularly in September and December, 1915, and January, 1916, and taking into account the difficulties of transport and shortage of labour on which the defendants relied at the trial, but which had not previously been set up as an excuse, leads me to the conclusion, and I find as a fact, that a reasonable time for delivery had expired on January 20, and that the defendants committed a breach of contract in not delivering before that date.

Upon this finding of fact I think that the decisions in *Davis* v. *Garrett* (1) and *Lilley* v. *Doubleday* (2), approved in *Royal Exchange Shipping Co.* v. *Dixon & Co.* (3), and more recently in *Morrison & Co.* v. *Shaw, Savill and Albion Co.* (4), are conclusive against the second and third contentions of the defendants. To quote the words of Tindal C.J. in *Davis* v. *Garrett* (1), "as a loss has actually happened whilst his wrongful act was in operation and force," they cannot set up as an answer to the action the bare possibility of a loss if their wrongful act had never been done. It is suggested that the principle of these decisions does not apply to an act of omission as in the present case, but I am unable to appreciate the distinction for this purpose between a breach of contract in not delivering at another place.

(1) (1830) 6 Bing. 716, 724.
(2) (1881) 7 Q. B. D. 510.
(3) (1886) 12 App. Cas. 11, 19.
(4) [1916] 2 K. B. 783.

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The point under the statute 14 Geo. 3, c. 78, s. 86, remains to be considered. Mr. Powell contends that this section ought to be construed literally and without limitation, and that it applies to any case in which goods which are the subject of the action in a building are destroyed in an accidental fire. It is not necessary in this case to decide what are the exact limitations of its application; it probably is intended only to exempt the occupier of a building, in the case of an accidental fire, from any liability at common law (1) to his landlord or to his neighbour in the event of the fire spreading, but I am clearly of opinion that it has no application to the present case, where the breach of contract had been committed before the fire occurred.

For these reasons I am of opinion that the plaintiffs are entitled to judgment for damages, the amount of which will be the value of the goods included in the order of January 7 and not delivered.

Judgment for plaintiffs.

Solicitor for plaintiffs: *G. E. Hodgkinson.*
Solicitors for defendants: *Danby, Brooks & Co.*

(1) *Quaere* whether there is any such liability.

J. H. W.

LEA BRIDGE DISTRICT GAS COMPANY, APPELLANTS *v.* MALVERN, RESPONDENT.

1917
Jan. 19.

Husband and Wife—Contract—Supply of Gas to House occupied by Woman after Death of Husband—Woman marrying again and occupying same House—Non-disclosure of second Marriage to Gas Company—Liability of Wife for Gas supplied subsequent to Marriage.

The respondent, after the death of her first husband, continued to reside in the same house as before, and took from, and paid the appellants for, a supply of gas, the accounts being made out in her widowed name. She married again, and her second husband then became the tenant and occupier of the house in which she had been living during her widowhood, but the fact of her remarriage was not made known to the appellants, who continued to supply gas to the house. The respondent paid one quarter's account for gas after her remarriage, but, not having paid the account for a later quarter, the appellants took proceedings against her to recover the amount:—

Held, that there was a contract by the respondent to pay for the gas supplied to the house until she gave the appellants notice to discontinue the supply or gave them notice of her marriage, and that as she had done neither she was liable for the amount.

CASE stated by justices for the county of Essex.

A complaint was preferred by the appellants, the Lea Bridge District Gas Company, against the respondent, under the Gasworks Clauses Acts, 1847 and 1871, alleging that she was indebted to them in the sum of 6*l.* 8*s.* 1*d.* for gas supplied to 50, Linfold Road, Walthamstow.

The appellants supplied gas for some years prior to March 8, 1915, to Albert Wood, the then husband of the respondent, at 50, Linfold Road, and the accounts for such gas were paid by him. Albert Wood died on March 8, 1915, the appellants becoming aware of that fact on March 16. The respondent took out letters of administration to her husband, and continued to reside at 50, Linfold Road, and she paid for the gas supplied to the premises for the quarters ending Lady Day and Midsummer, 1915, the accounts being made out in her name. In August, 1915, she married Thomas Malvern, who then became tenant and occupier of 50,

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Linfold Road; but the respondent did not inform the appellants of her marriage. The account for the gas consumed at the premises for the quarter ending Michaelmas was rendered to the respondent, made out in the name of Mrs. Wood, and paid by her. The account for the gas consumed at the premises for the quarter ending Christmas, 1915, was likewise rendered to the respondent. On January 4, 1916, she wrote a letter to the appellants in the name of Mrs. Wood, although her name was then Mrs. Malvern, not questioning her liability, but merely disputing the correctness of the account. The gas meter was removed and tested and certified to be correct. The appellants continued to supply gas to the premises until February 3, 1916, when it was cut off in consequence of the refusal of the respondent to pay for the gas supplied up to Christmas. The appellants were not aware that the respondent had married her present husband until she wrote a letter to them on January 27, 1916, signing it "Mrs. Malvern, late Mrs. Wood."

At the hearing of the complaint on March 1 the contention was raised for the first time that the respondent was not liable as she was not the consumer of the gas, that there was no contract made by her with the appellants, and that she was a married woman residing with her husband, who was the tenant and occupier of the premises.

The justices upheld the respondent's contentions and dismissed the complaint, but stated this case as to whether they were right in so doing.

Cautley, for the appellants. By s. 11 of the Gasworks Clauses Act, 1871, a gas company is bound to supply gas upon being required to do so by any owner or occupier of premises who serves a notice on the company specifying the premises and enters into a written contract to receive and pay for the gas. The appellants had supplied gas to the premises in question for some years and had been paid for the same by the respondent's first husband. After his death the respondent became the occupier of the house; gas continued to be supplied thereto, and a contract must be implied on the part of the respondent to pay for the same. Her liability was not altered by her second marriage, of which for the period in question the appellants had no knowledge. By not disclosing to the

appellants the fact of her second marriage the respondent held herself out to them as a principal and was contracting with them as such.

Ellis Hill (*C. E. Jones* with him), for the respondent. The justices were right. They properly applied the law laid down in *Paquin, Ld.* v. *Beauclerk.* (1) Where household necessaries are ordered by a married woman living with her husband, prima facie she contracts as agent for her husband and not as principal; the respondent must therefore be taken to have contracted on behalf of her husband, who is the tenant and occupier of the house to which the gas was supplied. Even if there was a contract by her with the appellants after the death of her first husband, that contract was terminated when she married again. The fact of her remarriage not having been communicated to the appellants does not affect the legal position.

VISCOUNT READING C.J. The question raised in this case is whether Mrs. Malvern, who was married after the date at which it is alleged that she contracted for the gas which was subsequently supplied by the appellants, can be made liable for that gas notwithstanding her marriage. [His Lordship stated the facts and continued:] The question we have to decide is one partly of law and partly of fact. We have the right to draw inferences of fact, though not inferences contrary to the findings of the justices. The justices clearly intended to leave to us the question whether there was a contract between the appellants and the respondent. As to that it appears that after the respondent became a widow she paid at least two quarters' accounts for gas supplied to the premises, and as the appellants continued to supply her as before with gas by meter I think they did so on the understanding that for the gas consumed she would pay in the ordinary way, that is, for each quarterly account when rendered. If that is right, the fact that the respondent married again does not, in my opinion, prevent the appellants recovering from her for the gas supplied under that contract. I think there was a contract by the respondent to pay for the gas supplied to her until she gave the appellants notice to discontinue the supply or gave them notice of her marriage,

(1) [1906] A. C. 148.

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Viscount Reading C.J.

by which it may be said that the hitherto existing contract came to an end. I therefore do not agree with the justices that there was no contract between the respondent and the appellants. It may be that in the circumstances of this case the respondent's husband might also be made liable, but it is unnecessary to discuss that point. I confine myself to answering the question asked by the justices by saying that on the facts as stated there was a contract by the respondent to pay for the gas supplied to her during the material time. The appeal must therefore be allowed.

RIDLEY J. I am of the same opinion. The difficulty has arisen from the respondent's marriage to Mr. Malvern. I think, however, that notwithstanding that marriage there is evidence on the facts as stated of a contract by the respondent with the appellants to pay for the gas. It appears that after the respondent lost her first husband on March 8, 1915, she continued to live in the same house and that she continued to take from the appellants a supply of gas. In August, 1915, she was married to her present husband, but no notice of that fact was given to the appellants, and in the absence of such notice her position in relation to the appellants remained the same. I think that the respondent, who continued in those circumstances to reside in the house after the death of her first husband, must be taken to have entered into a contract with the appellants that so long as they would supply her with gas to be consumed in that house she would continue to pay for it. There are no doubt difficulties when one considers the question as to the liability of the respondent's present husband, but I express no opinion upon that point.

LUSH J. I agree. It is impossible to resist the conclusion from the facts stated that there was a contract between the respondent and the appellants by which the respondent should pay for the gas supplied to the house in which she resided. The only question to be decided is that which has been argued before us, namely, whether that contract is binding on the respondent personally, or whether, having regard to the fact of her second marriage, the contract only binds her second husband. The proper inference

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Lush J.

to draw from the facts stated is that the contract for the supply of gas was entered into by the respondent prior to her second marriage. In substance the respondent told the appellants that she would continue to require a supply of gas and would continue to pay for it until notice was given for its discontinuance. She in fact paid for two quarters' supply of gas. She then married again, but the appellants were not informed of that fact, and no notice was given by her that a supply of gas to the premises would not be required, or that the person to whom the supply would be given would be some one other than herself. She allowed the appellants to supply gas to the premises on the terms of the original order. If one deals with the case on the basis that after her second marriage the respondent made fresh contracts with the appellants for the supply of gas, the only possible conclusion to which one can arrive is that she contracted, in the language of s. 1 of the Married Women's Property Act, 1893, "otherwise than as agent." She went on taking the supply of gas under the old order, and it is manifest that she contracted not as agent but, to the understanding of both parties to the contract, as principal. It is cogent evidence of this that at first she only disputed the correctness of the account, and did not suggest that she had not ordered the supply of gas or that she was not bound to pay for it. In *Paquin, Ld.* v. *Beauclerk* (1) the facts were quite different. There the Court of Appeal drew the inference that Paquin, Limited, believed the lady to be married when the first order was given, and held that, in the circumstances of that case, the lady had contracted as agent for her husband, she having no separate means and her husband being wealthy, and that decision was affirmed in the House of Lords. In the present case the facts are totally different. But even in that case Cozens-Hardy L.J. said (2): "I do not wish for one moment to forget that a wife may so conduct herself, and may make such a statement or do such an act as to preclude her from telling the truth, to estop her from saying she did contract as agent." I do not put this case on the ground of estoppel, though I am far from saying that it could not be decided on that ground. The respondent, however, so conducted herself as to make it impossible for us to say that the appellants cannot look to her as principal.

(1) [1906] A. C. 148. (2) [1906] A. C. 155, n.

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When the decision is ultimately given in favour of the appellants the order must be drawn up in proper form having regard to the fact that she is a married woman.

Appeal allowed.

Solicitors for appellants: *Blyth, Dutton, Hartley & Blyth.*
Solicitor for respondent: *Charles C. Sharman.*

J. S. H.

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DALE *v.* LONDON COUNTY COUNCIL.

Massage Establishment—Refusal of County Council to register—Appeal—Duty of Magistrate on hearing Appeal—London County Council (General Powers) Act, 1915 (5 & 6 *Geo.* 5, *c. ciii.*), *s.* 23.

By s. 23, sub-s. 1, of the London County Council (General Powers) Act, 1915, no person, unless registered with the Council, may lawfully carry on a massage establishment in London.

By sub-s. 5 the Council may by order refuse to register the name of any person carrying on or proposing to carry on such an establishment if (*a*) "The Council have reason to believe that the person carrying on or proposing to carry on such establishment is of bad character," or (*b*) "The Council have reason to believe that the premises are being used for any immoral purpose."

By sub-s. 6, before making the order they are to give the said person an opportunity of being heard against the order.

By sub-s. 8, any person who deems himself aggrieved by any such order may appeal to a metropolitan police magistrate, who, "after considering any representations made on behalf of the Council, may, if he thinks fit, confirm such order or direct the Council to withdraw such order":—

Held, that on the hearing of an appeal under that section the magistrate is not justified in confirming the order merely because he is of opinion that the Council had reason to believe that the appellant was of bad character or that the house was being used for immoral purposes; he must state that he entertained the same belief himself.

CASE stated by a metropolitan police magistrate.

The appellant, Mrs. Dale, appealed to the magistrate under s. 23, sub-s. 8, of the London County Council (General Powers) Act, 1915, against an order made by the Council as the licensing authority under Part V. of that Act refusing to register her as carrying on a

massage establishment at 1, York Street, St. James' Square. The magistrate, having heard the appeal, confirmed the order of the Council subject to the following case for the opinion of the Court :—

Under the London County Council (General Powers) Act, 1915, Part V., the Council on January 29, 1915, gave notice to the appellant in pursuance of s. 23, sub-s. 6, that it was their intention to make an order refusing to register the appellant's name and 1, York Street under the said Act, upon the grounds that " the Council has reason to believe that you are of bad character," and that " the Council has reason to believe that the premises are being used for an immoral purpose." This notice was issued after the appellant had on January 22, 1916, attended before the Public Control Committee of the said Council, to whom the duties under Part V. of the Act were assigned, and made application for registration and answered a number of questions put to her by members of the said committee and had called as a witness a person employed by her at the said premises, and after two other witnesses had been called before the committee and given evidence as to the character of the business conducted at the premises and had been cross-examined by the appellant. After the said hearing on January 22 a further hearing of the appellant's application took place on March 24, at which the appellant attended and answered further questions by members of the committee. The said committee having further considered the matter on the said March 24 decided that the Council under the said statute would refuse to register the appellant and the premises 1, York Street on the ground above mentioned, and made an order of refusal accordingly, whereupon the appellant appealed to the magistrate sitting at Bow Street Court.

At the hearing before the magistrate the shorthand notes of the proceedings on January 22 and March 24 were produced and proved. The appellant's counsel opened her case and called her and her witnesses for the purpose of showing that she was not of bad character, and that she should be registered in respect of the premises. Those witnesses were cross-examined on behalf of the respondents, and three witnesses were called on their behalf and cross-examined by the appellant's counsel. The magistrate adjourned his decision for the purpose of considering the evidence and of personally inspecting the premises 1, York Street, which he did. On May 31 he dismissed

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the appeal and confirmed the order of March 24 refusing to register the appellant and the said premises, as he considered that the respondents had adequate grounds for coming to the conclusion upon which the order was based.

It was contended before him by the respondents that under sub-s. 5 of s. 23 it was not necessary for the respondents to prove acts of immorality between men and women at the premises, but that it would be sufficient if the Council had reason to believe on the evidence that the premises were being used for any immoral or indecent purpose, and that the expression "have reason to believe" indicated that actual proof of immorality was not necessary. It was further contended that the word "are" in sub-s. 5 (*b*) did not limit the Council's grounds for refusing to register to a belief that the premises were then at the time of such refusal being used for immoral purposes, but that the Council could properly refuse to register the premises upon a reasonable belief that before the months of January and March, 1916, immoral conduct had taken place at the premises. The appellant, on the other hand, contended (*a*) that it was for the magistrate to decide upon the evidence before him whether in his opinion an order refusing to register the appellant ought to be made, and that it was not for him to consider whether there was evidence on which the County Council could have come to such a conclusion; and (*b*) that evidence that the premises had been used in 1913 and 1914 for immoral purposes was not evidence that the premises were being used for immoral purposes since the passing of the London County Council (General Powers) Act, 1915.

The magistrate was of opinion that there was evidence on which the Council had reason to believe that the premises were being used for immoral purposes at the date of the order, as there was no change of control of the premises since 1914; and also that they had reasonable grounds for believing that the appellant was of bad character at that date; and he dismissed the appeal.

Hawke, K.C., and *Harold Benjamin*, for the appellant. The question which the magistrate has to decide on the appeal is not whether the Council had reasonable ground for believing that the house was used for improper purposes; he has to put himself in the position of the Council and consider whether he has reasonable

ground for so believing. An appeal is prima facie a rehearing. Here the magistrate gave no intimation as to what his own opinion was, and it is quite consistent with his decision that it was very different from that of the Council. The words "May if he thinks fit confirm such order" mean that he "shall in his discretion" confirm it; but he must exercise his discretion, and that he has not done. Secondly, the fact there was evidence of the house having been used for immoral purposes two years before could afford no evidence of the purposes for which it was used at the date of the order.

Bodkin, for the County Council.

VISCOUNT READING C.J. This is an appeal by way of case stated from the decision of a magistrate upon an appeal by a person who applied to the London County Council for the registration of an establishment which came within s. 23 of the London County Council (General Powers) Act, 1915. Under that Act any establishment for massage or special treatment must obtain registration from the Council, failing which the proprietor must cease to carry on the business after February 1, 1915, subject to penalty for contravention. In this case Mrs. Dale applied to the County Council to register the premises 1, York Street, St. James' Square, for the purpose of an establishment for massage and special treatment. The Council duly heard the applicant in support of her application, but decided that they must refuse it. The applicant then appealed to the magistrate, and the question that arises for our decision is whether when the magistrate is exercising his jurisdiction under the statute he is bound to come to a conclusion of his own as to the grant or refusal of the registration, or whether it is sufficient for him to say that on the materials before him he does not think it right to interfere with the discretion of the Council. The question turns on sub-ss. 5 and 8 of s. 23. Under sub-s. 5 the Council may refuse to register if they "have reason to believe that the person carrying on or proposing to carry on such establishment is of bad character," or "have reason to believe that the premises are being used for any immoral purpose." The Council came to the conclusion that they had reason to believe that the applicant was of bad character, and also that the premises were being used for an immoral

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purpose. It is clear to my mind that it is not necessary that the Council should find as a fact that the premises were being used for an immoral purpose in the sense that they had evidence before them of acts of immorality. The Legislature has carefully said that they may refuse to register if they have reason to believe it. It is easy to see that there may be reason to believe that the premises are conducted in a particular way notwithstanding that there may not be any definite evidence on the subject at a particular date. Then sub-s. 8, which is the sub-section giving the right of appeal, has in it these words: "The magistrate" to whom jurisdiction is given to hear the appeal "after considering any representations made on behalf of the Council may if he thinks fit confirm such order or direct the Council to withdraw such order." Those are unusual words and must have a special meaning. I think they must mean that the magistrate before giving his decision is entitled to listen to representations not necessarily based on the actual evidence given. Then the words "if he thinks fit" make it quite clear that he has a discretion to exercise, and that he is bound to arrive at a decision as to how that discretion should be exercised. I do not think it is sufficient for him to say that the Council had materials upon which they could exercise their discretion in the manner in which they did. I think that the appeal must be allowed, and that the case must go back for him to decide for himself whether or not in the exercise of his own discretion he would have come to the same conclusion as the Council.

I do not think it necessary to say anything as to the second point, which does not really arise, except that if invited to give my view upon it I would confine myself to saying, without deciding it, that if the magistrate has evidence before him, either of the bad character of the applicant or of immoral purposes for which the house was used two years before, and nothing to show that there has been any change since that date, I should have thought that there was material upon which the magistrate could come to the conclusion that the house was being carried on in the same way and by a person of the same character on the date of the application for registration.

RIDLEY J. I agree. It appears to me that, although sub-s. 8 of s. 23 contains unusual language, it is clear that what the

magistrate is given jurisdiction to hear is an appeal, and I think it follows from that that the magistrate is bound to come to his own decision as to whether or not the order made by the Council is a proper one to be confirmed. Here the magistrate has not arrived at any conclusion of his own or purported to exercise his own discretion in the matter, and therefore I agree that the case should go back to him in order that he may do so.

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LORD COLERIDGE J. I am of the same opinion.

Appeal allowed.

Solicitor for appellant: *W. Ewart Craigen.*
Solicitor for County Council: *E. Tanner.*

J. F. C.

[IN THE COURT OF APPEAL.]

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Jan. 26, 29, 30, 31; *Feb.* 1.

HULTON *v.* HULTON.

[1915 H. 595.]

Husband and Wife—Action by Wife against Husband—Separation Deed—Action for Rescission on Ground of Fraud—Action of Tort—Restitutio in integrum—Married Women's Property Act, 1882 (45 *&* 46 *Vict.* c. 75), *s.* 12.

By s. 12 of the Married Women's Property Act, 1882, every woman shall have in her own name against all persons whomsoever, including her husband, the same civil remedies for the protection and security of her own separate property as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort.

In 1910 a deed of separation was executed by a husband and wife under which the husband agreed to pay to the wife during her life or until she should marry again the annual sum of 500*l.*, and the wife agreed to maintain herself and to keep indemnified the husband against her debts and torts, and not to take proceedings for restitution of conjugal rights nor for divorce or judicial separation in respect of any previous marital offence; and it was also agreed that all letters between the parties should be destroyed. The letters were accordingly destroyed and the husband paid his wife the 500*l.* a year. In 1915 the wife brought an action against the husband claiming to have the deed rescinded upon the ground

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that she had been induced to execute it by his false and fraudulent representations and concealment as to his means :—

Held, that before the Married Women's Property Act, 1882, such a claim was maintainable ; that the wife in claiming the relief was not suing her husband for a tort within the meaning of s. 12 of the Act of 1882 ; and that therefore the Act had not taken away her right to maintain the action.

The Court ordered the deed to be rescinded though the letters had been destroyed and could not be restored to the respective parties, and refused to make it a condition of rescission that the wife should repay to the husband the annual sums of 500*l.* which he had paid to her under the deed, the husband having received corresponding benefits under the deed.

Judgment of Lush J. [1916] 2 K. B. 642 affirmed.

APPEAL from the judgment of Lush J. at the trial of the action with a jury. (1)

The facts may be shortly stated as follows :—The plaintiff when the action was commenced was the wife of the defendant. On November 28, 1900, she and the defendant were privately married, but they never set up a joint establishment. The defendant's father was a newspaper proprietor in Manchester, and the business had been sold to a limited company in which the father held 103,276 shares of 1*l.* each out of 114,757 issued shares, and the defendant then held about 11,000 shares. The defendant allowed the plaintiff 500*l.* a year. According to the plaintiff's evidence the defendant stated that he had 1000*l.* a year from his father in payment for services in connection with newspapers, which could be taken from him by his father, and that he had no other income. In fact in 1899 a dividend of 50 per cent. had been paid on the shares. In March 1904, the defendant's father died, leaving an estate of 558,000*l.* According to the plaintiff's evidence the defendant told her that he was no better off after his father's death, his net income being the same. In February, 1905, they ceased to live together, but the defendant continued to pay her the 500*l.* a year. In 1909 the defendant advanced her 375*l.* to furnish a house, which was to be repaid by quarterly instalments of 25*l.* This led to solicitors being instructed, and ultimately a deed of separation of June 7, 1910, was executed. By this deed, which is set out in the report of the case in the Court

(1) [1916] 2 K. B. 642.

below, the parties agreed to live separate and not to molest, annoy, or interfere with each other; neither the husband nor the wife was to take any proceedings for restitution of conjugal rights, and the wife agreed not to take any proceedings against the husband to obtain a divorce or judicial separation in respect of any previous marital offence; the husband agreed to pay to the wife the clear annual sum of 500*l.* free of income tax during her life or, if she survived him, until she married again; the wife agreed to maintain herself and to keep the husband indemnified against her debts, liabilities, and torts, the husband released her from the sums of money advanced by him to her, and all letters and telegrams between the parties and all copies thereof were to be handed over to the respective solicitors for immediate destruction in the joint presence of the solicitors. (1) The letters were accordingly destroyed, and the annual sum of 500*l.* was paid to the plaintiff down to the date of the decree absolute for dissolution of marriage hereinafter mentioned. On March 2, 1915, this action was brought to obtain rescission of the deed of separation upon the ground that it was obtained by the fraudulent representations of the defendant as to his means, and for damages for the fraud. The statement of claim is fully set out in the report of the case in the Court below. The allegation was that the defendant had persistently represented that his income was only about 1000*l.* a year or thereabouts, whereas upon his father's death his pecuniary position had greatly improved, his income being upwards of 30,000*l.* a year. The defendant denied that he made any such representations or concealed the amount of his income. Shortly before the date of the writ in the present action the plaintiff filed a petition for dissolution of her marriage with the defendant; and on July 8, 1915, a decree nisi was granted, the decree being made absolute on February 7, 1916 (before the trial of this action). Since the decree was made absolute under an order of the Divorce Division permanent maintenance was fixed at 5000*l.* a year to be paid to the plaintiff from February 7, 1916.

The learned judge left the question to the jury whether the plaintiff was induced to execute the deed of separation by the false and

(1) This last term was, it was stated, inserted at the instance of the defendant.

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fraudulent representations and concealment of the defendant, and the jury answered this question in the affirmative. The learned judge then made an order that the deed should be rescinded, the plaintiff undertaking as a condition of the judgment to refund the 375*l.* advanced by the defendant to her, by means of a deduction from her taxed costs, but refused to order her to refund the 500*l.* a year paid to her since the date of the deed; and he further held that the plaintiff could not in law recover from her husband damages for the fraud.

The defendant appealed and asked for judgment, and in the alternative for a new trial upon the ground that the verdict of the jury was against the weight of the evidence. The plaintiff served notice of cross-appeal against that part of the judgment which held that she could not recover damages for the fraud. At the hearing of the appeal, however, counsel for the plaintiff said that, without making any admission that the cross-appeal was ill-founded, they did not, in view of the present position, propose to argue the cross-appeal.

1917. Jan. 26, 29, 30, 31. *Schwabe, K.C.*, and *Barrington-Ward*, for the defendant. The verdict of the jury that the defendant made false and fraudulent representations to the plaintiff as to his means and that she was thereby induced to execute the deed of separation is against the weight of the evidence and there should be a new trial. [*Redgrave* v. *Hurd* (1) was referred to.]

Next, if the verdict stands, the action for rescission of the deed on the ground that it was obtained by fraud is not maintainable by reason of s. 12 of the Married Women's Property Act, 1882. The action is in substance "for a tort" within the meaning of that section. The substance and not the form of the action must be looked at. If the substance of the action is a tort committed by a husband against his wife the Court will not entertain it. A wife may sue her husband even in tort for the protection and security of her separate property, but that is not this action. In this action the plaintiff is only claiming a remedy for a wrong done to her, and she must prove facts which in an ordinary case would give rise to a claim for damages. An action by a husband against his wife for an injunction to restrain

(1) (1881) 20 Ch. D. 1.

her from pledging his credit is an action for a tort within the meaning of s. 12 : *Webster* v. *Webster*. (1) Before the Act of 1882 a married woman could have sued her husband in a Court of Equity to obtain rescission of a deed obtained from her by duress : *Lambert* v. *Lambert*. (2) It is not contended that any distinction in this respect can be drawn between duress and fraud. Sect. 12 of the Act of 1882 has, however, deprived a married woman of the right to sue her husband in tort except for the protection and security of her separate property. [*Evans* v. *Carrington* (3) and *Evans* v. *Edmonds* (4) were also referred to.]

Even if the action will lie, the Court will not grant rescission of the deed, because there can be no restitutio in integrum. The letters between the parties have been given up and destroyed, and they cannot be restored. The plaintiff has never offered to repay the 500*l*. a year which has been paid to her by the defendant, and the Court will not order rescission unless the plaintiff repays the sum so paid to her. A contract obtained by fraud is voidable, and if the person defrauded elects to avoid it the other party is entitled to be replaced in statu quo ; otherwise the Court will not rescind the contract : *Urquhart* v. *Macpherson*. (5) It is a condition of rescission that there must be restitutio in integrum. If the plaintiff seeks rescission she must return the benefits which she has received under the deed.

[SWINFEN EADY L.J. referred to *Adam* v. *Newbigging* (6), and Arnould on Marine Insurance, 9th ed., p. 1565.]

[They also contended that the separation deed had ceased to operate upon the decree absolute for divorce, and that the plaintiff had no longer any interest in having it set aside.]

Sir John Simon, K.C. (*Hemmerde, K.C.*, *W. O. Willis*, and *Guedalla* with him), for the plaintiff, was only called upon to argue whether the plaintiff could claim rescission without repaying the annual sums paid to her under the deed. Where a Court of Equity is asked to rescind a deed or other contract the maxim "He who seeks equity must do equity" applies : Story on Equity Jurisprudence, 2nd English ed., s. 693. In *Erlanger* v. *New Sombrero*

(1) [1916] 1 K. B. 714, 717.
(2) (1767) 2 Bro. P. C. 18.
(3) (1860) 2 D. F. & J. 481.
(4) (1853) 13 C. B. 777.
(5) (1878) 3 App. Cas. 831, 838.
(6) (1886) 34 Ch. D. 582 ; (1888) 13 App. Cas. 308.

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Phosphate Co. (1) Lord Blackburn states the general rule thus: "It is, I think, clear on principles of general justice, that as a condition to a rescission there must be a restitutio in integrum. The parties must be put in statu quo"; and then a little later he says: "I think the practice has always been for a Court of Equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract." Restitution therefore is not always a condition precedent to rescission, though it is in most cases: see also *Rees* v. *De Bernardy*. (2) The Court will do what is "practically just." By the fraud of the defendant the plaintiff, the innocent party, has from the date of the separation deed down to the date of the decree absolute for dissolution of marriage been receiving far less than she was entitled to as the wife of a wealthy man, and when she took proceedings for dissolution of marriage the deed prevented her from asking for alimony pendente lite to a greater amount. The defendant, on the other hand, was relieved from maintaining her in consideration of this very inadequate payment. It would be wholly inequitable to order her to repay the 500*l.* a year. The permanent maintenance allotted to her only dates from the decree absolute, and therefore there is nothing against which it can be set. It is not like the case of property obtained by fraud in consideration of a money payment where, if the contract is rescinded and the property restored, it is only just that the money should be repaid. The defendant has received full consideration for the payment of the 500*l.* a year, and as he cannot return the consideration he has received, the plaintiff cannot be called upon to repay the 500*l.* a year. [*Donovan* v. *Fricker* (3) and *Whittington* v. *Seale-Hayne* (4) were referred to.]

Schwabe, K.C., in reply.

Feb. 1. SWINFEN EADY, L.J. This action was tried by Lush J. and a special jury. The plaintiff when the action was commenced was the wife of the defendant. Since the action has been pending she has obtained a divorce from him. The object of this action was to

(1) (1878) 3 App. Cas. 1218, 1278, 1279.
(2) [1896] 2 Ch. 437, 445, 446.
(3) (1821) Jac. 165.
(4) (1900) 82 L. T. 49.

obtain the rescission and setting aside of a deed of separation between the plaintiff and defendant, dated June 7, 1910, which the plaintiff alleged had been obtained by fraudulent misrepresentations of the defendant, and for damages. The judge left to the jury the question whether the plaintiff was induced by the false and fraudulent misrepresentation of the defendant to execute the deed of separation. The jury answered the question in the affirmative. Thereupon the judge set aside the deed, but held as matter of law that the plaintiff could not recover from her husband damages for the fraud. (1) The defendant appeals, and contends that judgment should be entered for him, or in the alternative that there should be a new trial on the ground that the verdict was a perverse one, and that, especially having regard to certain letters, no reasonable men could find that the plaintiff was induced by fraud to enter into the deed. He also contended that the plaintiff could not legally maintain the action against her husband to set aside the deed for fraud, as he said that would be suing her husband for a tort, which would be contrary to the provisions of s. 12 of the Married Women's Property Act, 1882. He also contended that the deed could not be set aside, as there could not be restitutio in integrum. There was a notice of cross-appeal by the plaintiff in which she asked to have it determined that the decision of the judge was erroneous when he held that the action, so far as it was a claim for damages, was not maintainable. This cross-appeal was not, however, proceeded with, and should be dismissed with costs. [The Lord Justice stated the facts at length (a short epitome of which is given above), and referred to the evidence and the summing-up of the learned judge, and came to the conclusion that it was quite impossible to maintain the position that no reasonable men could upon the evidence before them have found the verdict which the jury returned, and that therefore the application for a new trial must fail.]

It was next contended that the plaintiff could not maintain this action by reason of the Married Women's Property Act, 1882, s. 12. It was not disputed that previous to the passing of this Act a married woman could have sued her husband to set aside a deed obtained by fraud or duress, the married woman, according to the old practice, suing by her next friend (see Mitford on Pleading, p. 28), and

(1) [1916] 2 K. B. 642.

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consenting to the action being brought. The practice of the Court of Chancery was for actions that lay in infants or married women to be instituted by the next friend, the difference between them being that when the infant was plaintiff his consent was not necessary for the institution of the action, but that where the action was brought by a married woman by her next friend her consent was necessary. This was pointed out in *Andrews* v. *Cradock*. (1) *Lambert* v. *Lambert* (2) was an action brought by a wife by a next friend against her husband and others to set aside as having been obtained by duress a deed dated November 29, 1762, whereby the husband agreed to give his wife 20*l*. a year by way of a separate maintenance. The wife succeeded in the action, and the decree was affirmed by the House of Lords. The appellant, however, contended that the right to bring such an action was taken away from a married woman by s. 12 of the Act of 1882, as the wife would be suing the husband for a tort. In my judgment this contention is not well founded, whether the claim to set aside the deed is based on facts which would or which would not as between other parties give ground for an action of deceit. A proceeding to set aside a deed for fraud is not suing for a tort within the meaning of s. 12. It is one of the matters which by the Judicature Act, 1873, s. 34, are assigned to the Chancery Division. A claim in an action to obtain damages for deceit would, in my opinion, be suing for a tort. In my judgment there is nothing in s. 12 of the Act of 1882 to take away from a married woman the right which she previously possessed of taking proceedings against her husband to have set aside any deed obtained by him from her by fraud or duress. The ancient jurisdiction of the Court in this respect is not diminished or affected by s. 12 of the Act of 1882.

There remains the further point that the plaintiff cannot obtain the setting aside of the deed as there cannot be complete restitutio in integrum. The learned judge accepted the plaintiff's undertaking to repay the debt of 375*l*., from which she was released by the deed, by allowing that sum to be set off against costs awarded to her, but he declined to require her as a condition of relief to repay the annual sums of 500*l*. paid to her between the date of the deed and the date

(1) (1713) Prec. in Ch. 376; 1 Eq. C. Ab. 72.
(2) 2 Bro. P. C. 18.

of the decree absolute made by the Divorce Court. It must be remembered that the plaintiff had been receiving an allowance of 500*l.* a year from 1905 or before to the date of the deed in 1910. The same sum continued to be paid to her after the deed and pursuant to the deed, and she lived upon that amount, and the defendant's credit was not pledged by the plaintiff for any necessaries. These were obtained by means of the annual payment. Moreover, the deed, so long as it stood, was a bar to the plaintiff obtaining alimony pendente lite from the Divorce Court. The permanent maintenance of 5000*l.* a year now fixed by that Court as a suitable provision for the plaintiff, and to be paid by the defendant to her, only commences to run from the date of the decree absolute, namely, February 7, 1916. The appellant now contends that he ought to escape from all liability to maintain his wife between June 7, 1910, the date of the deed, and February 7, 1916, and that the plaintiff ought to be put upon terms to refund all sums paid in respect of the period between the two last-mentioned dates; in other words, that the plaintiff should repay all sums paid to her, while he retains the full benefit and advantage of escaping from the burden of maintaining his wife during that period, and of having by means of the deed and so long as it remained in force prevented her from obtaining any alimony pendente lite from the Divorce Court. In my judgment this would be entirely inequitable. As against the defendant, upon the facts as they are now known, it must be taken that no less sum than 500*l.* a year could be considered a suitable provision for the wife's maintenance, and this is all that he has paid. I agree with the view expressed by the learned judge at the trial that, having regard to the defendant's actual means and to the finding of the jury, such a sum was altogether inadequate. The general rule is that as a condition of rescission there must be restitutio in integrum, but at the same time the Court has full power to make all just allowances. It was said by Lord Blackburn in *Erlanger* v. *New Sombrero Phosphate Co.* (1) that the practice had always been for a Court of Equity to give relief by way of rescission whenever by the exercise of its powers it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract. In the present case the defendant has obtained certain

(1) 3 App. Cas. 1278, 1279.

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advantages for which he stipulated, which cannot be taken away from him—the destruction of his letters is an accomplished fact, and he has been relieved of any claims in respect of the maintenance of his wife between the date of the deed and the date of the decree absolute. Under these circumstances the most that can be required of the plaintiff, as a condition of rescission, is to restore to the defendant the status quo ante with regard to the advance of 375*l*. This she does by allowing the amount to be set off against her costs.

It was further urged that the plaintiff did not really desire rescission, and could gain nothing by it. This must be considered with reference to the date when the action was commenced, namely, March 2, 1915. The deed was then a subsisting contract which prevented the plaintiff from instituting proceedings for restitution of conjugal rights, from obtaining a divorce for any previous matrimonial offence, from obtaining alimony pendente lite ; and it bound her to indemnify the defendant from all torts theretofore committed or thereafter to be committed by her. If such a deed was obtained from her by fraud—and the jury have found that it was—she was entitled to have it set aside.

In my opinion the appeal fails and should be dismissed.

BANKES L.J. I agree. We have no power to set aside the verdict of a jury upon the ground merely that we do not agree with it. We can only set aside a verdict upon the ground that it is against the weight of the evidence if we come to the conclusion that the verdict is one which no reasonable men could have arrived at. That is the question which we have to consider. This is certainly a remarkable action. The main claim of the plaintiff was for damages. In my opinion that claim was one which, as a matter of law, could not possibly succeed. The second ground of claim was for the rescission of the deed of separation. [The Lord Justice discussed the evidence, and came to the conclusion that he was unable to say that the verdict was one which no reasonable men could have arrived at, and upon that ground the application for a new trial failed.]

With regard to the point that the plaintiff is not entitled to recover because she is, by this claim for rescission, suing her husband for a tort within the meaning of s. 12 of the Married Women's Property

Act, 1882, I entirely agree with what has been said by Swinfen Eady L.J. I think it is sufficient to say that, in my opinion, the words in that section "sue for a tort" relate to something quite different from that which is described in s. 34 of the Judicature Act, 1873, as "a cause or matter for the purpose of the setting aside or cancellation of deeds or other written instruments."

With regard to the point that the plaintiff is not entitled to succeed without bringing into account the 500*l.* a year which she received between June 7, 1910, and February 7, 1916, the date of the decree absolute, it is sufficient to say that, in my opinion, we should not be doing either equity or justice if we were to order the plaintiff under the particular circumstances of this case to repay that amount.

SCRUTTON L.J. I am of the same opinion. Mrs. Hulton brought an action against her husband alleging that a deed of separation, dated June 7, 1910, had been obtained by fraudulent representations made by him, and claiming (1.) damages for the fraud; (2.) alternatively rescission of the deed. The action was tried before Lush J. and a special jury. The learned judge held that an action to recover damages for fraudulent representations could not be brought by a wife against her husband by reason of s. 12 of the Married Women's Property Act, 1882, which provides that "no husband or wife shall be entitled to sue the other for a tort." In the Court below counsel for the plaintiff put forward an extremely subtle argument—so subtle that I do not attempt to state it, because it is quite possible that I have not understood it—to show that this particular action for deceit was not really an action for a tort within the meaning of that section, but was an action for the protection of her separate property. The plaintiff gave a notice of cross-appeal against the judgment of the learned judge dismissing the claim for damages for tort, but in this Court counsel for the plaintiff did not proceed with the cross-appeal upon the ground that the plaintiff had attained what she desired, namely, a considerable money payment under the order of the Divorce Court for permanent maintenance. That part of the claim therefore disappears, and I can only say that I entirely agree with the judgment of the learned judge that it was quite unsustainable.

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There remains the other part of the claim, namely, for rescission of the deed. It was argued for the defendant that, as the plaintiff, in proving facts which would entitle her to rescission, would prove fraudulent representations which would give rise to a claim for damages in an action between parties other than husband and wife, a claim for rescission was really a claim for a tort within s. 12 of the Married Women's Property Act, 1882. The jurisdiction to rescind a contract in some cases for innocent misrepresentation and in some cases for fraud has been exercised by Courts of Equity long before the Act of 1882 was passed and before the action of deceit in its present form came into existence. The action of deceit, whereby damages are obtained for fraudulent representation, as I understand the history of the English law, was first supported by the Courts in the case of *Pasley* v. *Freeman*. (1) The representation there was as to the credit of a third person. In that case Grose J., who dissented, said that that was the first instance on record in which such a claim had been made; and twenty-seven years afterwards in *Ashlin* v. *White* (2) Gibbs C.J. said: "I am old enough to remember when this species of action came into use. It was dexterously intended to avoid the Statute of Frauds." Therefore in 1882, when s. 12 of the Act of 1882 was passed, there were two forms of action, one affecting the formation of a contract and saying that the contract was badly formed if it had been obtained by fraud and asking for rescission, and the other claiming damages for a fraudulent representation. It seems to me that the proceeding in a Court of Equity to obtain rescission is not an action "for a tort" within the meaning of s. 12. I understand that expression to mean an action complaining of a tort independently of contract and asking for damages following from such a tort. I do not see how that language can apply to a proceeding which asks for rescission on the ground of fraud in connection with the making of a contract. This part, therefore, of the defendant's appeal fails, and the Court below had jurisdiction to consider whether the deed of separation was obtained by fraud.

The next question is whether this Court should interfere with the finding of the jury that the plaintiff was induced by the false and

(1) (1789) 3 T. R. 51; 2 Sm. L. C., 12th ed. p. 71.
(2) (1816) Holt, N. P. 387, 388.

fraudulent representation of the defendant to execute the deed of separation, not upon the ground that there was no evidence to support it, but upon the ground that the verdict was against the weight of the evidence, though in my view it comes to nearly the same thing; and the question which we have to ask ourselves is whether twelve reasonable men could on the evidence have found the verdict. [The Lord Justice referred to the evidence, and came to the conclusion that he could not say that the verdict was one which a reasonable jury could not upon the evidence have found, and that therefore the defendant failed on that part of the case where he asked for a new trial on the ground that the verdict was against the weight of the evidence.]

There remains the last point. It is said that the Court will only rescind the contract if it can put the other party back in the position in which he was before the contract. Courts of Equity, which have long exercised this power of rescission, have endeavoured to do so on the principle that he who seeks equity must do equity, and that he who asks to have a contract rescinded must as far as possible put the parties back into the position in which they were before the contract was made. The passage from Lord Blackburn's opinion in *Erlanger* v. *New Sombrero Phosphate Co.* (1), which has been referred to by Swinfen Eady L.J., pointed that out in very clear language. It is said that the Court should not order rescission for two reasons. In the first place it is said that the letters have under the terms of the deed been destroyed, and that as those letters cannot be restored the Court will not decree rescission. Now I must take it on the verdict of the jury that those letters contained misrepresentations by the defendant. I further take into account that it was the defendant who was anxious that those letters should be destroyed. I cannot in these circumstances treat the letters as so important to him that there can be no rescission because they cannot be brought back into existence. Secondly it is said that the plaintiff has been receiving under the deed 500*l.* a year for over five years, and that if the deed is rescinded the plaintiff ought to be ordered to repay that 500*l.* a year. A Court of Equity has always in such a case, as I understand, endeavoured to do justice between the parties by making each of them return whatever benefit he has received

(1) 3 App. Cas. 1278, 1279.

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under the deed, and if the benefits on the one side and the other are commensurate there is no question of return, because whatever has been received by the one party has been paid for by the other. As an illustration of that I may take the case of the purchase of a house being set aside and a reconveyance ordered on repayment of the purchase-money, when the party who has occupied the house has to pay an occupation rent: see Kerr on Fraud and Mistake, 4th ed., p. 371, where the authorities are collected. Applying that to the present case, while it is true that the wife has received 500*l.* a year for some years, the husband has received during those years freedom from molestation, freedom from proceedings by the wife for restitution of conjugal rights, and other very considerable advantages. Taking all that into account, I see no reason for ordering the return of the 500*l.* a year, a sufficient quid pro quo having been given to the husband. Upon all points the appeal fails.

Appeal and cross-appeal dismissed.

Solicitors for plaintiff: *Guedalla & Jacobson.*
Solicitors for defendant: *Lewis & Lewis.*

W. F. B.

BARRETT *v.* ILKESTON CORPORATION.

1917
Feb. 27.

[1916 B. 2320.]

Water—Supply—Beerhouse—Supply by Measure—Building used partly as Dwelling-house and partly for Trade Purposes—Water used for Domestic Purposes—Ilkeston and Heanor Water Act, 1901 (1 *Edw.* 7, *c. ccl.*), *ss.* 80, 83.

A local Water Act provided that the water authority should at the request of the occupier of a dwelling-house furnish a sufficient supply of water for domestic purposes at certain specified rates per annum, and the Act further provided that the water authority was not bound to supply with water otherwise than by measure any building used partly as a dwelling-house and partly for a trade purpose :—

Held, that the authority was not bound to supply water otherwise than by measure to the occupier of a dwelling-house who carried on thereon the business of a beerhouse keeper, notwithstanding that the water was used solely for domestic purposes.

Oddenino v. *Metropolitan Water Board* [1914] 2 Ch. 734 followed; *Metropolitan Water Board* v. *Avery* [1914] A. C. 118 distinguished.

Special Case stated in an action.

The plaintiff's claim as indorsed on the writ was for a declaration that the plaintiff was entitled to a supply of water to a house and premises known as the Prince of Wales Inn, situate in Ilkeston in the county of Derby, for domestic purposes at a rate not exceeding 6 per cent. upon the rateable value of the premises in accordance with the provisions of s. 80 of the Ilkeston and Heanor Water Act, 1901 (1), and for an injunction to restrain the defendants

(1) Ilkeston and Heanor Water Act, 1901 (1 Edw. 7, c. ccl.), s. 80: "(1.) Each constituent authority shall at the request of the owner or occupier of any dwelling-house or part of a dwelling-house entitled to demand from such authority a supply of water for domestic purposes furnish to such owner or occupier a sufficient supply of water for such domestic purposes at rates not exceeding the rates per annum herein-after specified (that is to say):— . . . ."

Sect. 83: "(1.) Neither constituent authority shall be bound to supply with water otherwise than by measure any building used partly as a dwelling-house and partly as a warehouse or for any trade or manufacturing purpose for which water is required or any workhouse hospital or other large public institution."

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from refusing to supply water to the premises otherwise than by meter and/or from cutting off the supply of water to the premises.

The parties had concurred in stating the questions of law arising in the action in the following case for the opinion of the Court:—

1. The plaintiff is, and was at all material times, the owner and occupier of the Prince of Wales Inn. The defendants are a constituent authority within the meaning of, and are authorized and required to supply water within the district in which the said premises are situate in accordance with, the provisions of the Ilkeston and Heanor Water Act, 1901.

2. The plaintiff is, and was at all material times, the holder of a licence granted pursuant to the provisions of the Licensing Act for the sale of beer by retail for consumption on the premises; the trade of a beerhouse keeper is carried on on the premises, which, however, are kept as a beerhouse only and not as an inn or eating-house, and, except in so far as required and used for the supply of beer to customers for consumption both on and off the premises, are used only for the accommodation of the plaintiff and his family.

3. Prior to the events in paragraph 6 hereinafter mentioned the premises were supplied with water by the defendants at a rate calculated on the rateable value of the premises, namely, 45*l.*, in accordance with the provisions of s. 80 of the above Act, and water rates calculated on the basis aforesaid have been paid by the plaintiff to the defendants quarterly until June 30, 1915.

4. The water so supplied by the defendants is conveyed through pipes connected respectively with the bath and geyser and two water-closets and with two taps, one of which is situated in the cellar and the other in the scullery of the premises. There is also a urinal upon the premises, which is flushed by rain water collected from the roof of the premises and not by water supplied by the defendants.

5. The water supplied by the defendants to the premises has been at all times used by the plaintiff solely for washing, drinking, cooking, and sanitary purposes within the house, and, except in so far as water is required for washing drinking vessels provided for the

plaintiff's customers, solely for the personal requirements of the plaintiff and his family.

6. By letter dated July 3, 1916, the defendants threatened to cut off the supply of water to the plaintiff's premises unless the plaintiff signed a printed form of agreement providing for the supply of water to the premises by measure.

The question for the opinion of the Court was whether under the above circumstances, and having regard to the provisions of s. 83 of the Ilkeston and Heanor Water Act, 1901, and to the fact that the defendants were willing to comply with those provisions, the plaintiff was entitled to a supply of water to the premises for domestic purposes at a rate not exceeding 6 per cent. of the rateable value of the premises in accordance with the provisions of s. 80 of the above Act.

Compston, K.C., and *Maddocks*, for the plaintiff. The provisions of s. 80 of this local Act are in substance the same as those of ss. 8 and 25 of the Metropolitan Water Board (Charges) Act, 1907, and the House of Lords held in *Metropolitan Water Board* v. *Avery* (1) that the expresssion "domestic purposes" in that Act had reference to the user of the water. In the present case it is clear that, although the plaintiff carries on the trade of a beerhouse on his premises, the water is not required for any trade or manufacturing purpose, but for domestic purposes only, and therefore *Avery's Case* (1) is a conclusive authority in favour of the plaintiff. It is true that in *Oddenino* v. *Metropolitan Water Board* (2), which turned on s. 20 of the Act of 1907, Sargant J. sought to distinguish *Avery's Case* (1), but his decision is really inconsistent with the decision of the House of Lords and ought not to be followed. [*Pidgeon* v. *Great Yarmouth Waterworks Co.* (3), *Frederick* v. *Bognor Water Co.* (4), and *Colley's Patents* v. *Metropolitan Water Board* (5) were also referred to.]

Rigby Swift, K.C., and *Jeeves*, for the defendants. The supply of water is dealt with in this Act, and also in the Act of 1907, from two points of view, the purpose for which the water is used and the

(1) [1914] A. C. 118.
(2) [1914] 2 Ch. 734.
(3) [1902] 1 K. B. 310.
(4) [1909] 1 Ch. 149.
(5) [1912] A. C. 24.

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building to which it is supplied. Sect. 80 of this Act and ss. 8 and 25 of the Act of 1907 relate only to user. Sect. 83, which corresponds with s. 20 of the Act of 1907, is the section which applies to this case, and on the plain language of that section the plaintiff is not entitled to a supply of water otherwise than by meter, for the plaintiff's premises are partly used for a trade purpose. Sect. 20 of the Act of 1907 was not considered by the House of Lords in *Avery's Case* (1), for the parties were merely seeking to obtain a judicial decision as to the meaning of the expression "domestic purposes" in ss. 8 and 25 of the Act of 1907. *Oddenino's Case* (2) was rightly decided and should be followed in this case.

BAILHACHE J. This case raises a very simple question, namely, whether water supplied to the plaintiff, who is the occupier of a beerhouse, is to be paid for at a rate calculated on the rateable value of his premises or by meter. The plaintiff resides at his beerhouse, and it is therefore a house used partly as a dwelling-house and partly for the purpose of carrying on the trade of a beerhouse keeper. The matter falls to be determined under ss. 80 and 83 of the Ilkeston and Heanor Water Act, 1901. [The learned judge read the sections.] I think that Mr. Rigby Swift is right in saying that in those two sections the question of water supply is regarded from two different points of view. Sect. 80 deals with the purpose for which the water is used; s. 83 with the nature of the premises to which it is supplied. I should have had no difficulty in deciding that the plaintiff comes within s. 83, and not within s. 80, were it not for the decision of the House of Lords in *Metropolitan Water Board* v. *Avery* (1); and in referring to that case I should add that, if the question which I have to decide were as to the purpose for which the water supplied to the plaintiff is used, I am satisfied that on the authority of that case the purpose is a domestic purpose. At first sight, and but for the distinction which I have pointed out, the question in that case would seem to have been the same as arises in this case, and the decision of the House of Lords was that the water was used for domestic purposes. But the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), contains a section, s. 20, which is in substance to the same effect

(1) [1914] A. C. 118. (2) [1914] 2 Ch. 734.

as s. 83 of this local Act, and, if my view of s. 83 is right, s. 20 would have been a short answer to the contention raised by the appellants in the House of Lords as to the meaning of s. 25. But, again, I think the explanation suggested by Mr. Rigby Swift is the right one. The appellants, the Metropolitan Water Board, were seeking to get the House of Lords to determine what are, and what are not, domestic purposes, and therefore, it did not suit them to rely on s. 20, for if they had they would not have obtained the decision which they wanted. Similarly, the respondent did not rely on s. 20, for the simple reason that if she had done so she would have been out of Court. That is the view of *Avery's Case* (1) taken by Sargant J. in *Oddenino's Case* (2), where he said : " In my opinion, on the clear language of s. 20 the test is the character of the house to which the water is being supplied and not the purpose to which the water is actually being put. The Board are exempted from supplying water otherwise than by meter ' to any house or building whereof any part is used for any trade or manufacturing purpose for which water is used,' that is to say, directly it can be predicated of a house that it or any part of it is used for a trade or manufacturing purpose for which water is used the option is given to the Board to refuse to supply that house otherwise than by meter." I think also that sub-s. 2 of s. 83 supports the view that s. 83 is concerned with the character of the house. That sub-section provides that where water is supplied to any building by measure the authority shall also, on the application of the occupier, supply it with sufficient water for domestic purposes at a rate not exceeding 1*s.* 6*d.* per 1000 gallons, provided that the authority shall not be compelled to afford to any premises a supply of water by measure for a less sum in any quarter than the amount of the rate which would have been payable in respect of the premises for a supply otherwise than by measure. In the present case the water is used solely for domestic purposes, and the plaintiff will therefore have to pay 1*s.* 6*d.* per 1000 gallons unless that is less than the amount calculated on the rateable value.

I come to the conclusion that the defendants are right in their view of the law, and that *Avery's Case* (1), which at first sight

(1) [1914] A. C. 118. (2) [1914] 2 Ch. 740.

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seemed a binding authority in this case, is distinguishable for the reasons stated by Sargant J. in *Oddenino's Case*. (1)

Judgment for defendants.

Solicitors for plaintiff: *Indermaur & Brown, for Cliffords, Derby.*

Solicitors for defendants: *King, Wigg & Brightman, for S. F. James, Ilkeston.*

F. O. R.

1917
Jan. 16.

THE KING *v.* THE WESTMINSTER UNIONS ASSESSMENT COMMITTEE.

Ex parte WOODWARD & SONS.

Rates—London—Quinquennial Valuation—Increased Rateable Value—Notice sent by Post but not received—"Deemed to have been served and received"—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67), *ss.* 9, 65.

By s. 9, sub-s. 1, of the Valuation (Metropolis) Act, 1869, where the overseers of a parish raise the gross or rateable value of a hereditament above the value stated in the valuation list for the time being in force they shall at the time prescribed serve on the occupier of the hereditament a notice of the gross and rateable value inserted in the valuation list.

By s. 65 all notices may be served and sent by post by a prepaid letter addressed to the person affected, and if sent by post shall be deemed to have been served and received respectively at the time when the letter containing the same would be delivered in the ordinary course of post, and in proving such service or sending it shall be sufficient to prove that the letter containing the notice was properly addressed and prepaid and put into the post:—

Held by Viscount Reading C.J. and Lush J., that delivery to the post office of a letter containing a notice properly addressed and prepaid as directed by s. 65 raises a presumption that the notice has been received by the addressee; that this is not merely a presumption of fact until the contrary is shown, but is a presumption of law which cannot be rebutted by showing that in fact the notice had not been received.

Held by Ridley J., that s. 65 provides a statutory method of giving notice, and that when a notice has been sent as directed it is not necessary to show that the addressee has received it.

The overseers of a parish raised the rateable value of a heredita-

(1) [1914] 2 Ch. 740.

ment in the parish. They posted a notice prepaid and properly addressed to the occupiers of the hereditament, who, however, never received it. The occupiers having obtained a rule nisi for a mandamus to the assessment committee to hear their objection to the assessment on the ground that the overseers had not served upon them any notice of increase in the value of the hereditament :—

Held, that the occupiers must be taken to have received the notice, and that the rule nisi must be discharged.

RULE NISI for a mandamus to the assessment committee of the unions of the city of Westminster to hear and determine an objection by James Woodward & Sons to the assessment hereafter mentioned.

James Woodward & Sons, the prosecutors, were a firm of gunsmiths and the rated occupiers of No. 64, St. James's Street, Pall Mall. These premises consisted of a shop and basement occupied by the prosecutors and an upper part also occupied by the prosecutors and used as club premises by the Cocoa Tree Club. In the year 1910 a quinquennial valuation list was made for the parish of St. James in the Pall Mall Ward by the council of the city of Westminster as the overseers of that parish. In this list No. 64, St. James's Street was inserted in this wise : The shop and basement, assessment No. 1082, gross value 450*l.*, rateable value 375*l.* ; and the upper part (club-house), assessment No. 1083, gross value 525*l.*, rateable value 438*l.* The prosecutors appealed to the assessment committee and from them to the quarter sessions, with the result that the assessment of the upper part was reduced to 400*l.* as the gross value and 334*l.* as the rateable value.

No alterations had been made in the upper part between 1910 and 1915, and no notice was received by the prosecutors of any change being made in the assessment in the quinquennial valuation list prepared in the year 1915 ; but on inspecting the valuation list on April 11, 1916, the prosecutors found that the upper part was again assessed at 525*l.* as the gross value and 438*l.* as the rateable value.

On April 15, 1916, the solicitor to the prosecutors wrote to Mr. John Hunt, the town clerk and clerk of the assessment committee of the Westminster City Council, applying to the committee to hear the appeal of the prosecutors against the alteration of the assessment on the ground that no notice of alteration had been

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REX v. WESTMINSTER UNIONS ASSESSMENT COMMITTEE. WOODWARD & SONS, *Ex parte.*

served upon them as required by s. 9 of the Valuation (Metropolis) Act, 1869. (1) Mr. Hunt replied that notice of the altered values had been properly addressed, prepaid, and put into the post on June 5, 1915; and in a later letter he pointed out that by s. 65 of the above-mentioned Act (1) it was sufficient for the overseers to prove that this had been done. In the result the assessment committee declined to hear the objection of the prosecutors, who thereupon obtained the rule nisi on the following grounds:—

1. That the council of the city of Westminster, being the overseers of the parish of St. James, Westminster, did not serve on the prosecutors, being the occupiers or the persons liable to pay the rates assessed on 64, St. James's Street, upper part, pursuant to s. 9 of the Valuation (Metropolis) Act, 1869, a notice of the gross and rateable value inserted in respect of the premises in the valuation list made under the said Act in the year 1915 for the parish, the assessment having been raised above the value stated in the valuation list for the time being in force.

(1) Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 9: "....

"(1.) Where the overseers of the parish .... raise the gross or rateable value of some hereditament above the value stated in the valuation list for the time being in force ....

. . . . . .

the overseers shall immediately after the deposit or re-deposit of the list (as the case may be) serve on the occupier of such hereditament a notice of the gross and rateable value thereof inserted in the valuation list."

Sect. 65: "All orders and notices under this Act .... shall be in writing or print, or partly in writing and partly in print .... and all orders, notices, and documents required .... to be served on or sent to any person or body of persons corporate or unincorporate may be either delivered to such person or the clerk of such body, or left at the usual place of abode of such person or clerk, or at the office of such clerk or body, or (if such abode or office cannot on reasonable inquiry be discovered) at the premises to which the order, notice, or document refers.

"They may also be served and sent by post, by a prepaid letter, addressed to such person, or to the office of such body or to their clerk, and, if sent by post, shall be deemed to have been served and received respectively at the time when the letter containing the same would be delivered in the ordinary course of post, and in proving such service or sending it shall be sufficient to prove that the letter containing the notice was properly addressed and prepaid and put into the post."

2. That any such notice if posted was never received by the prosecutors and never delivered by the post at the said premises.

3. That the assessment committee ought to have heard and determined the application made on behalf of the prosecutors against the increased rateable value at which the premises were assessed in the valuation list made in the year 1915.

The evidence on behalf of the assessment committee showed that on June 4, 1915, notice of deposit of the valuation list was duly given, and that at noon on June 5 to all persons, including the prosecutors, the value of whose hereditaments had been raised above the value stated in the valuation list theretofore in force, notices by prepaid letter properly addressed had been delivered at the post office at Charing Cross.

Ryde, K.C., and *Konstam* showed cause. Sect. 65 of the Valuation (Metropolis) Act, 1869, prescribes the method whereby notices are to be served. The overseers have done all that is required of them in relation to this notice. Accordingly the notice is "deemed to have been served and received." If it has been served and received there is an end of this case.

Secondly, provisions as to notices are directory and not essential: *Reg.* v. *Ingall.* (1) If this were not so one slip might invalidate the whole valuation list. To avoid this s. 45 of the Act of 1869 enacts that the valuation list, subject to the corrections permitted by s. 42, "shall be deemed to have been duly made in accordance with this Act and the Acts incorporated herewith, and shall for all or any of the purposes in this section mentioned be conclusive evidence of the gross value and of the rateable value of the several hereditaments included therein." Under s. 42 the overseers deposit the valuation list before June 1 in the year of valuation. They transmit the list to the assessment committee between fourteen and seventeen days after notice of the deposit. Notice of objection must be given before the expiration of twenty-five days after the deposit of the list. Sixteen days after the transmission of the list the assessment committee hold a meeting for hearing objections. They must give sixteen days' notice before the meeting. Within three days after it is approved by them the assessment

(1) (1876) 2 Q. B. D. 199.

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committee send the list to be re-deposited, and appoint a day not less than fourteen nor more than twenty-eight after the re-deposit for hearing objections to the alterations. They finally approve and send the list to the overseers before November 1. There follow provisions for appeal to special sessions which are not material. In the present case the first step to be taken by the prosecutors, namely, notice of objection within twenty-five days of notice of deposit, was never taken. It follows that the valuation list is conclusive.

Morton Smith in support of the rule. The question is as to the meaning of the words "shall be deemed to have been served and received" in s. 65. These words do not import an irrebuttable presumption that the notice has been received. The words "shall be deemed to have been served" occur in s. 267 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), relating to the service of notices, orders, and any other documents, including summonses: *Reg.* v. *Mead.* (1) It could hardly be intended that a man could be fined without having received notice in fact. Sect. 26 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), throws some light on the proper meaning to be given to such words. It enacts that "Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve,' or the expression 'give' or 'send,' or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post." So in this case the notice if sent as directed is to be deemed to have been served and received unless the contrary is proved. If the letter had been produced in Court by some third person to whom it had been delivered by mistake, could it be said that the prosecutors must be deemed to have received it? A ratepayer whose premises are assessed too highly suffers a great hardship if they are to remain so because he, through no fault of his own, has received no notice of the assessment.

(1) [1894] 2 Q. B. 124.

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VISCOUNT READING C.J. This rule was obtained on the ground that Messrs. James Woodward & Sons, the prosecutors, who were the occupiers or persons liable to pay the rates on the upper portion of No. 64, St. James's Street, had not received notice of the gross and rateable value inserted in respect of the premises in the valuation list. They say that no such notice was ever sent, or that, if it was, they never received it; and they ask that the assessment committee be commanded to hear and determine their objection to the list. The committee refuse to do this on the ground that everything has been done that was necessary according to the terms of the statute. The question is whether there has been effected on the prosecutors such a service as precludes them from objecting that they have not been served. When the requirements of s. 65 have been complied with, does that section create an irrebuttable presumption of due service, so that the prosecutors cannot raise the point that they have not been served with the notice? Sect. 65 of the Act first deals with the form of orders and notices and specifies means whereby they may be served. It continues thus: "They may also be served . . . ." [The Lord Chief Justice read the latter part of s. 65 and continued:]

The assessment committee contended that the natural and ordinary meaning of this enactment is that if there has been sent by post a prepaid letter addressed to the person who is the occupier of the premises to be assessed the statute has been complied with, and the person cannot be heard to say that he has not in fact received the notice contained in the letter. On the other hand, the prosecutors contended that the words in their fair and natural meaning do no more than establish a prima facie case of service and are not strong enough to preclude them from proving that in fact the notice never was received by them. It is necessary to decide this point because I am satisfied that a prepaid letter was sent by the overseers within the prescribed time and also that the prosecutors did not in fact receive it. In deciding this question we do not in my view derive much assistance from considering other statutes, such as the Public Health Act, 1875, though drawn in similar or even identical words. We must look to the particular statute containing the section in question. I agree with Mr. Morton Smith to this extent, that if the wording of a statute is ambiguous, and if it is possible for the Court

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to give it a fair and ordinary meaning which will avoid all hardship and injustice, the Court would choose that construction; but we are not entitled, merely because we think they might create possible injustice or injury, to alter the words of an Act of Parliament. On a consideration of this statute I have come to the conclusion that once there has been proved the sending by post of a prepaid letter properly addressed containing a notice the assessment committee have proved all that is necessary, and that there is an end of any question of service. The words in s. 41 of the earlier Act, the Union Assessment Committee Act, 1862, were not so ample or extended as those in s. 65 of the Act of 1869. The earlier Act provided that notices to be given by the committee might be "sent by the post to the party . . . . to whom such . . . . notice purports to be . . . . given." By s. 65 of the Act of 1869 terms are imposed upon individuals subject to the jurisdiction of the assessment committee which are more severe than those imposed by the earlier Act. A notice prepaid and addressed as directed by s. 65 if sent through the post "shall be deemed to have been served and received respectively at the time when the letter containing the same would be delivered in the ordinary course of post." That provision applies to a case where in fact the notice has not been received, otherwise it has no meaning. The intention is to treat as a fact something which has not been established as a fact—even something which can be shown not to be a fact. The section continues: "and in proving such service or sending it shall be sufficient to prove that the letter containing the notice was properly addressed and prepaid and put into the post." In my view, when those conditions have been performed it must be taken as concluded that the notice has been served and received. In this opinion I am fortified by the whole scheme of the Act. It is most important for the local government of the country that assessments should be made by a properly constituted committee whose duties and obligations should be defined by statute. We are not dealing with reciprocal rights and duties of individuals. The assessment committee is a public statutory authority; its acts affect every rateable individual within its jurisdiction. The inconvenience and expense of calling upon the committee to prove that in each individual case the notice had been sent and

received prompted the Legislature to find some way by which when certain conditions were fulfilled the notice might be taken to have been received. They had recourse to another public department, the post office, and enacted that when a prepaid letter had been handed to the postal authority it must be taken to have been duly delivered to the addressee as letters are delivered in the ordinary course. If it should happen that a notice is not received the hardship, if any, must be borne by the individual. It is no greater than that which by the common law falls on one of two negotiating parties who have agreed to receive communication through the post. If a letter is posted its contents are taken to have been received although in fact it has not reached the addressee. The hardship must fall on one party or the other. It falls on him who has named the post office as his agent to receive the communication. Similarly here the hardship must fall on the public authority or on the individual. Looking at the whole purview of the statute, I think it was intended that it should fall on the individual. It is permissible to consider which of two alternatives is the lesser evil, as was done by Mellor and Lush JJ. in *Reg.* v. *Ingall.* (1) In the present case it is not necessary to have recourse to that principle, because on the wording of the Act I think that Parliament has selected the lesser evil. I cannot find in the enactment the words which Mr. Morton Smith would read into it, that the notice shall be deemed to have been served and received until the contrary is shown. It must be taken for the purposes of this case that the prosecutors were duly served with the necessary notice. That being so, there is an end of the matter and the rule must be discharged.

RIDLEY J. I agree, although my mind has fluctuated during the argument. In my view the draftsman of s. 65 was not dealing with the difference between prima facie proof and absolute proof. The words of the section are not addressed to that. The subject-matter of enactment was the condition to be imposed upon the overseers when altering the quinquennial valuation list. Accordingly it was provided in s. 9 that, on an increase of assessment, the overseers must serve on the occupier a notice of the gross and rateable values

(1) 2 Q. B. D. 207, 208.

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inserted in the new list. It was thought that a mere notice affixed to the church gate, sufficient for a general notice of the deposit of the valuation list, would not be sufficient notice to an individual whose assessment had been raised. On the other hand it would have laid a heavy burden upon the assessment committee to oblige them to prove the sending and delivery to each individual in turn of the notice required by s. 9. It was decided to ease them of that burden. With that object s. 65 was drawn. Actual service of the notice and prima facie or conclusive evidence of actual service are not the points in view in this section. The point was what should be done by the overseers in order to bring into play the powers of the assessment committee under the Act, and it was enacted that it should not be necessary that every person should actually be in possession of a notice before an increase in his assessment can be approved, but that it should be sufficient if a prepaid letter containing the notice and properly addressed was put into the post. If that is done the notice must be taken to have been served and received in the ordinary course of post. The words "shall be deemed to have been served and received" have reference simply to the time at which the notice is deemed to have been delivered. This gives to the section a reasonable construction defining the duties of the overseers in serving notices of alteration in assessment upon individuals. In the great majority of cases actual delivery of the notice is achieved. Only in exceptional cases is it otherwise. I agree that the rule should be discharged.

LUSH J. I agree and only wish to add this: In order to interpret s. 65 of the Valuation (Metropolis) Act, 1869, it is not only legitimate but necessary to consider the language of ss. 41 and 42 of the earlier Act, the Union Assessment Committee Act, 1862, which, for the purposes of the metropolis only, s. 65 has superseded. Those two sections of the Act of 1862 prescribe how the notices and orders and statements referred to therein may be served. They represent the law at present in force in places other than the metropolis. In the metropolis s. 65 provides a method of service. Instead of merely repeating the provisions of the earlier enactments, namely, that notices, &c., may be served by being "sent by the post" or "sent through the post office," s. 65 contains these additional words: "and,

if sent by post, shall be deemed to have been served and received respectively at the time when the letter containing the same would be delivered in the ordinary course of post, and in proving such service or sending it shall be sufficient to prove that the letter containing the notice was properly addressed and prepaid and put into the post." With these two enactments standing side by side, one of them applicable to the metropolis only and the other to places other than the metropolis, how can we say that the additional words in s. 65 have no operation and were intended to effect no alteration in the law? Yet if we accede to the argument of Mr. Morton Smith we must say that. When the earlier Act authorized the sending of notices by post, on proof of posting a prepaid letter the presumption would arise that the letter was received by the addressee. If Mr. Morton Smith is right, the additional words in s. 65 import that and nothing more. But taken in their ordinary sense they point to a difference between the metropolis and other places, namely, that in the metropolis, on proof of certain acts, there shall be no further question as to whether the notice has been received or not. On proof that the letter was properly addressed, prepaid, and put into the post, the rest follows without further proof that the document has been served upon and received by the person affected. The whole scheme and scope of the Act seem to confirm this view. By s. 45 the Legislature enacted that the valuation list when once made and deposited "shall be deemed to have been duly made in accordance with this Act." The purpose is this: Within a certain time questions may be raised by parties aggrieved. When that time has passed the valuation list shall be deemed to have been duly made notwithstanding any accidental defects. Mr. Morton Smith contends that it is a hardship that a person whose property has without notice been over-assessed should lose his right to complain. There may be cases of hardship. The Legislature has provided for the fixing of notices with regard to assessments. The notice in question is an additional notice given to the party concerned. I fail to see that the hardship upon a person who, through the letter going astray in the post, never gets the notice he ought to have had, is substantially greater than that suffered by a person who never sees the notice on the church door because he is many miles away. The rating of the metropolis is a

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matter of great importance and complexity. What is to happen if mistakes occur? If valuation lists are to be challenged months after they have been deposited because through some misfortune an individual has never had notice of an increase in his assessment, the general inconvenience would be out of all proportion to the hardship which the individual will suffer if the list remains as deposited. We cannot accede to the argument based on considerations of hardship. I agree that the rule must be discharged.

Rule discharged.

Solicitor for prosecutors: *Edward Betteley.*

Solicitors for assessment committee: *Allen & Sons.*

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Oct. 31; *Nov.* 1, 30.

[IN THE COURT OF APPEAL.]

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[1915 H. 1561.]

Alien Enemy—Partner—Outbreak of War—Dissolution of Partnership—Legal Proceedings against Enemies Act, 1915 (5 *Geo.* 5, *c.* 36).

Held, unanimously, that a partnership between a British subject and a German subject, the latter being resident in Germany, in a business carried on in England, the continuance of which during war between England and Germany would involve intercourse with the enemy, is dissolved by, and at the date of, the outbreak of war between those countries.

Held, further, by Swinfen Eady L.J. and Bankes L.J. (A. T. Lawrence J. dissenting), that the provisions of the Partnership Act, 1890, as to the winding up of a partnership are applicable in such a case; that the English partner was not entitled to purchase the enemy partner's share at a valuation or to take it himself upon paying its value; and that the enemy partner was entitled to a share of the profits made after the dissolution by the English partner carrying on the business with the aid of the enemy partner's share of the capital.

Held by A. T. Lawrence J., that the enemy partner was not entitled to a share of the profits accruing after the partnership had become illegal.

APPEAL from a decision of Atkin J., reported [1916] 1 K. B. 763.

The plaintiffs were a company registered under the Companies Acts, carrying on business at Manchester. The defendants were

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a company incorporated and carrying on business at Dresden in Germany. An agreement made between the parties on November 22, 1906, provided that the plaintiffs should be the sole agents for the sale in Great Britain and the British Colonies of a machine made by the defendants for the manufacture of metal edgings for cardboard and other boxes, and that the plaintiffs should manufacture the metal edgings in England in partnership with the defendants. The agreement was in force when the war between this country and Germany commenced on August 4, 1914. The action was brought under the Legal Proceedings against Enemies Act, 1915, and the plaintiff claimed declarations (1.) that the contract dated November 22, 1906, was dissolved on August 4, 1914; (2.) that the agency constituted by the contract was terminated on August 4, 1914, and that the defendants were only entitled to such sum in respect thereof as was due to them by the plaintiffs on that date; (3.) that the partnership constituted by the contract was dissolved on August 4, 1914, and that the defendants were only entitled to such sum as might be found due to them upon the taking of an account in the winding up of the partnership, upon the basis that it was terminated upon that date; (4.) as to the basis upon which the account was to be taken with regard to certain machinery on the plaintiffs' premises; and (5.) that the defendants were not entitled to any of the profits of the English factory after August 4, 1914.

Atkin J. held that the partnership was dissolved by, and at the date of, the outbreak of war; that the provisions of the Partnership Act, 1890, as to the winding up of a partnership were inapplicable; that the defendants were entitled to have their interest in the partnership at the date of dissolution valued, including their share of the goodwill, if any, and to be paid the amount thereof when payment became legally possible, and that they had an equitable lien on the partnership assets for the amount due to them, but that they were not entitled to a share of the profits of the business earned after the commencement of the war by the plaintiffs through their carrying on the business after that date. The learned judge made the following declarations: (1.) that the contract in writing dated November 22, 1906, between plaintiffs and defendants was dissolved on August 4, 1914; (2.) that the agency constituted by the said

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contract was dissolved on August 4, 1914, and that defendants are only entitled to such sum in respect thereof as was due to them by plaintiffs on that date; (3.) that the partnership constituted by the contract was dissolved on August 4, 1914; that the defendants were entitled to the value of their share in the said partnership, including goodwill, if any, as of the date of August 4, 1914; that clause 12 of the agreement was not applicable; and that the defendants were not entitled to any of the profits of or interest in the capital of the partnership since August 4, 1914.

The defendants appealed.

C. W. Lilley, for the appellants.

Leslie Scott, K.C., and *Spear*, for the respondents.

The arguments were the same as in the Court below, and are not repeated here. The following additional authority was cited: *Daimler Co.* v. *Continental Tyre and Rubber Co.* (1)

SWINFEN EADY L.J. read the following judgment:—The defendants appeal from a declaratory judgment of Atkin J. in an action commenced under the statute 5 Geo. 5, c. 36, intituled "An Act to facilitate Legal Proceedings against Enemies in certain cases." The writ is indorsed with a claim for a declaration that the effect of the present war is to terminate a contract of agency and dissolve a partnership between plaintiffs and defendants entered into before the outbreak of war, and also for a declaration that the defendants have only certain rights in respect thereof mentioned in the indorsement. The defendants contend that the declaration made by the judge is erroneous in law and in effect confers rights on the plaintiffs to which they are not entitled.

The plaintiffs are an English limited company, and the defendants are a German company, carrying on business at Dresden.

By an agreement in writing, dated November 22, 1906, and made between the plaintiffs and defendants, and which was a subsisting agreement at the date of the outbreak of war, the plaintiffs became the sole agents of the defendants for Great Britain and the British Colonies for the sale of the defendants' "metal edging and studding" machines at a commission of 15 per cent. on machines

(1) [1916] 2 A. C. 307, 344.

sold through their agency. These machines are made in Germany, and are used for affixing metal edges and studs to cardboard boxes.

By the same agreement the parties became partners in the business of manufacturing in England and selling here and in the British Colonies the metal edges and studs. This business was carried on at the "clamp factory," a part of the plaintiffs' own works, for which an agreed amount was payable to the plaintiffs and the business was carried on in the name of the plaintiffs only, and all goods sold were invoiced to customers in the plaintiffs' name only, the name of the German firm not appearing. In some cases the plaintiffs themselves bought the goods so manufactured for use in their own separate business of cardboard box making, and the agreement fixed the price at which they were entitled so to do. In other cases the metal edges and studs were sold to outside customers, and the agreement also fixed the prices for these sales.

Certain machinery and fittings were necessary for the manufacture of these clamps, and such machinery belonged to the partners in equal shares, and for any additional machines required each partner was to contribute half the cost. The agreement further provides that before dividing profits interest at 5 per cent. is to be allowed on each partner's capital.

At the trial the judge declared that the agency constituted by the agreement was terminated and the partnership dissolved on August 4, 1914, by the outbreak of war. The defendants contended on this appeal that such declaration was erroneous, but in my judgment it was clearly right. No partnership can exist between an enemy company resident in Germany and an English company resident here. If two partners are resident in two different countries, and war breaks out between those countries, the partnership is determined and put an end to by the war: *Evans* v. *Richardson* (1); *Griswold* v. *Waddington* (2); Lindley on Partnership, 8th ed., pp. 87, 88; Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 34. Similarly the contract of agency was terminated by the war. It was a trading contract, and war dissolves all contracts which involve trading with the enemy: *Esposito* v. *Bowden*. (3) The language of

(1) (1817) 3 Mer. 469.
(2) (1819) 16 Johnson, Sup. Ct. New York, 438.
(3) (1857) 7 E. & B. 763, 784.

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the declaration as to the rights of the parties consequent on the termination of the agency requires certain verbal amendments, which were agreed to while the appeal was being argued. As amended it will be as follows :—2. That the agency constituted by the said contract was terminated on the 4th day of August, 1914, and that the defendants are entitled to such sum in respect thereof as was due to them from the plaintiffs on that date, and also to such further sum in respect thereof as has since become due, and to the return of all unsold machines (if any).

The defendants' main contention on this appeal is that the judgment is wrong in deciding that upon the dissolution the English partner has a right to purchase the share of the enemy partner at a valuation, and that the enemy partner is not entitled to any profits or interest on capital since August 4, 1914, notwithstanding that by the contract of partnership he is allowed 5 per cent. interest on capital, and although the English partner has since the outbreak of war carried on the business of the partnership and used the partnership capital and machinery, of which a moiety belongs to the enemy partner.

In the absence of a special agreement to the contrary, the general rule is that on the dissolution of a partnership all the property belonging to the partnership shall be converted into money by a sale, even although a sale may not be necessary for the payment of debts : Lindley on Partnership, 8th ed., p. 623.

In *Darby* v. *Darby* (1) Kindersley V.-C. said : " What is the clear principle of this Court as to the law of partnership ? It is, that on the dissolution of the partnership all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners, according to their respective shares in the capital. That is the general rule ; it requires no special stipulation ; it is inherent in the very contract of partnership. That the rule applies to all ordinary partnership property is beyond all question, and no one partner has a right to insist that any particular part or item of the partnership property shall remain unsold, and that he shall retain his own share of it in specie. This principle is clearly laid down by Lord Eldon in *Crawshay* v. *Collins* (2) and by Sir

(1) (1856) 3 Drew. 495, 503. (2) (1808) 15 Ves. 218.

William Grant in *Featherstonhaugh* v. *Fenwick* (1), and the right of each partner to insist on a sale of all the partnership property, which arises from what is *implied in the contract of partnership*, is just as stringent as a *special contract* would be. . . . . No one partner can insist on retaining his share unsold." In *Syers* v. *Syers* (2) Lord Cairns said that on a dissolution of partnership the ordinary course would be for the Court to direct a sale of the assets, and if necessary a sale of the concern as a going concern, and to give liberty for proposals to be made by either party to purchase it before the judge in chambers. He added that, having regard to the nature of the business and to the very small interest taken in it by the respondent, it would have been a proper order for the judge to make if he had authorized the owner of seven-eighths of the concern to lay proposals for a purchase before the judge in chambers, and the order made by the House arrived in substance at the same end. This order was made in the undoubted jurisdiction of the Court in winding up a partnership and controlling the realization of the assets and the ascertainment of the shares of the partners. The Court (as was said by Lord Cairns) has regard to all the circumstances, and moulds the judgment to meet the particular case. This, however, is entirely different from the judge making an order in an action in which the Court is not winding up the partnership, and which is not brought for that purpose, which in effect declares that the British partner has a right to acquire the share of the enemy partner.

In the present case there is no contract giving the plaintiffs the right to purchase their late partner's share at a valuation, or to take it themselves upon paying its value, and I fail to see any ground upon which the judgment in this respect can be supported.

I am of opinion that the effect of the war is not to confer upon the English partner a right to buy his late partner's share at a valuation which he would not otherwise have had.

Again, by s. 42 of the Partnership Act an outgoing partner is entitled to a share of the profits made after the dissolution, or to interest where the business of the firm is carried on with its capital or assets, without any final settlement of accounts as between the firm and the outgoing partner. No exception is made by the statute

(1) (1810) 17 Ves. 298. (2) (1876) 1 App. Cas. 174, 183.

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in the case where the dissolution is the result (s. 34) of a partner becoming an enemy. The fact that the enemy partner cannot during the war bring any action to enforce such right does not prevent the existence of the right. Debts owing to enemies are not confiscated on the occurrence of war, although during the war enemies cannot sue for payment.

The plaintiffs in carrying on the business in England after August 4, 1914, were not under the control of the enemy, or communicating or holding any intercourse with him, or receiving anything from him, or sending anything to him, or making any payment to him. They were not trading with him, although some benefit might accrue to the enemy from what they were doing. Every transaction whereby a profit may ultimately enure to an enemy is not necessarily a transaction entered into for the benefit of an enemy. If it were, no English company with a single enemy shareholder could continue to trade. Again, some profits may have arisen from the business after the commencement of the war from contracts entered into or obligations incurred previously. In *Daimler Co.* v. *Continental Tyre and Rubber Co.* (1) the following passage occurs in the speech of Lord Parker of Waddington, in which Lords Sumner, Mersey, and Kinnear concurred—that is to say, the majority of the House concurred in this view. Lord Parker said: "It was suggested in argument that acts otherwise lawful might be rendered unlawful by the fact that they might tend to the enrichment of the enemy when the war was over. I entirely dissent from this view. I see no reason why a company should not trade merely because enemy shareholders may after the war become entitled to their proper share of the profits of such trading. I see no reason why the trustee of an English business with enemy cestuis que trust should not during the war continue to carry on the business, although after the war the profits may go to persons who are now enemies, or why moneys belonging to an enemy but in the hands of a trustee in this country should not be paid into Court and invested in Government stock or other securities for the benefit of the persons entitled after the war. The contention appears to me to extend the principle on which trading with the enemy is forbidden far beyond what reason can approve or the law can warrant. In early days the King's

(1) [1916] 2 A. C. 307, 347.

prerogative probably extended to seizing enemy property on land as well as on sea. As to property on land, this prerogative has long fallen into disuse. Subject to any legislation to the contrary or anything to the contrary contained in the treaty of peace when peace comes, enemy property in this country will be restored to its owners after the war just as property in enemy countries belonging to His Majesty's subjects will or ought to be restored to them after the war. In the meantime it would be lamentable if the trade of this country were fettered, businesses shut down, or money allowed to remain idle in order to prevent any possible benefit accruing thereby to enemies after peace. The prohibition against doing anything for the benefit of an enemy contemplates his benefit during the war and not the possible advantage he may gain when peace comes." There is, however, considerable difficulty in the way of an outgoing partner seeking to establish that profits have been made since the dissolution which are attributable to the use of his share of capital or assets. It is almost always necessary to direct special inquiries, rendered necessary by the nature of the business and many other circumstances which have to be taken into consideration. In some cases the subsequent profits made may be wholly attributable to the diligence, business aptitude, credit, and personal qualities of the remaining partner. Indeed, Lord Lindley states in the 8th edition of his book, at p. 677, that he is not aware of any instance in which a judgment for a share of profits after dissolution has been worked out and has resulted beneficially to the person in whose favour it was made.

Whatever difficulties there may be in the way of the defendants establishing a right to any sum as profit which has arisen since August 4, 1914, the plaintiffs are not entitled, in my judgment, to a declaration that under no circumstances can the defendants claim any profit which has arisen or been received after August 4, 1914.

Again, there is the alternative of interest, from which he is also excluded by the judgment. Under the circumstances before mentioned, probably a claim for interest would be the real and effective claim in the present case, and not profits. Upon what ground can it be maintained that the plaintiffs, having used the defendants' share of the partnership assets since the outbreak of war in carrying on the business, are under no obligation to pay interest in respect

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thereof? A debt which by law carries interest, and which is owing to an enemy does not cease to carry interest by reason of the war, although the enemy cannot enforce payment until the return of peace. If the principal of the debt is not confiscated, why should the interest be confiscated? The learned judge below said, "Enemy property in this country is not to be confiscated"; yet the effect of the judgment is to confiscate the interest, as if the defendant had not been an enemy he could certainly have claimed interest. In *Wolff* v. *Oxholm* (1) the plaintiffs recovered against the defendant, who had formerly been an enemy, a large sum for interest which accrued during the war. In like manner interest must run in favour of an enemy during the war, although not then actually payable to him. "By Magna Charta merchant strangers are, upon the breaking out of a war, to be attached and kept without harm to body or goods, until it shall be known how the English merchants are treated by the sovereign of their State, and if the latter are safe *there*, the former are to be safe *here*. So that foreign merchants could suffer nothing in England unless by way of retaliation and reprisal": per Lord Ellenborough in *Wolff* v. *Oxholm*. (2) Parliament has from time to time passed statutes dealing with the property of enemies in time of war from the same point of view. The statute 34 Geo. 3, c. 79 (1794), passed during the war with France, "was not an act of confiscation to the benefit of the State, but a measure of policy not less generous than lawful, by which at the same time that the transmission of money to the enemies of the State was prevented, the money itself was called in, secured, and kept for those to whom it was due, until the return of peace should enable them to receive it": per Lord Ellenborough in *Wolff* v. *Oxholm*. (3)

Again, the Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12), proceeds from the same point of view in providing for the appointment of a person to act as "custodian of enemy property." It recites that it is expedient to make further provision for preventing the payment of money to enemies, and for preserving, with a view to arrangements to be made at the conclusion of peace, such money and certain other property belonging to enemies. It

(1) (1817) 6 M. & S. 92. (2) Ibid. 103.
(3) Ibid. 106.

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will be for Parliament to determine hereafter what is to be the ultimate disposition of such enemy money and property, which in the meantime is to be preserved. It is quite inconsistent with these provisions to hold that any rule of public policy requires or sanctions the confiscation to a British partner of interest which would otherwise be payable by him to an enemy partner. The public policy of this country as declared by Parliament is that such interest should be "preserved with a view to arrangements to be made at the conclusion of peace." The Court is not entitled to invent a new head of public policy—*Janson* v. *Driefontein Consolidated Mines* (1), per Lord Halsbury—and say that public policy requires that any interest of an enemy partner shall be forfeited to a British partner. The defendants' rights flow from the contract of partnership which was legal when entered into.

Recent legislation has prevented the occurrence of such a deadlock as was suggested in argument. By s. 4 of the Trading with the Enemy Amendment Act, 1916 (5 & 6 Geo. 5, c. 105), the Board of Trade may vest the interest of the defendants in the partnership and assets in the custodian, with full powers of selling, managing, or otherwise of dealing with it. A sale by the custodian under this statute of the enemy's interest in the partnership and assets and in any profits or interest would confer a good title upon the purchaser.

In my judgment the declaration which the plaintiffs have obtained is too favourable to them. The words "the value of" in the third declaration contained in the judgment should be struck out. Also the words "as of the date August 4, 1914," and also the words "and that the defendants are not entitled to any of the profits of or interest in the capital of the partnership since August 4, 1914." The appellants fail in their contention that war did not dissolve the partnership and succeed with regard to the declaration. Each party must be left to bear his own costs of the appeal.

BANKES L.J. read the following judgment:—The main question raised by this appeal is as to the rights of partners inter se where one partner was a British subject and the other an enemy residing in the enemy country, and where the partnership which carried on

(1) [1902] A. C. 484, 491.

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business in this country was dissolved by operation of law by the declaration of war between this country and the enemy country.

It was faintly argued that the declaration of war did not dissolve the contract. It appears to me to be settled beyond all question that this contention is not maintainable. What then is the position of the British subject partner whose partnership has under these circumstances been dissolved ? At a very late stage in the argument for Messrs. Stevenson it was suggested that the share of the enemy partner had by the common law vested in the Crown. It is not, I think, necessary to consider what the position of the British subject partner would have been had this been the case. The point is not referred to in the pleading, and was not mentioned in the Court below ; and the whole of the legislation which has been passed since the beginning of the war dealing with enemy property in this country rests on the assumption that the Crown is not insisting on any common law right to claim such property.

Under these circumstances, and apart from recent legislation, the position of the British subject partner is one of great difficulty. It would have been impossible for him to bring his late partner before the Courts of this country to obtain either an adjudication as to their rights or a winding up of the partnership. The interest of the enemy partner was not confiscated by the declaration of war, and the British subject partner would have been bound to respect that right. It is easy to see that in many cases this state of things would have resulted in a complete deadlock, to the great injury of the British subject partner. It was in order to obviate such a state of things that the Legislature has provided certain machinery by which the British subject partner may not only obtain a decision in the Courts of this country as to his rights, but an authorized representative of his late enemy partner can be appointed to take charge of and realize his interest.

The present proceedings are only rendered possible by reason of the Act 5 Geo. 5, c. 36, which was passed to facilitate legal proceedings against enemies in certain cases. The declarations asked for by the statement of claim proceed upon the assumption that the partnership was dissolved on August 4, the date of the declaration of war against Germany, and that a line is to be drawn as on that date ; that the enemy partner is entitled to his share of any

profits made up to that date, and to the value of the assets ascertained as of that date; but that as from that date the British subject partner is entitled to the goodwill of the business and to the assets, including the machinery, of the partnership, and to use them as he pleases and to keep any profits made by using them. The argument before Atkin J. in support of this position was that it was not in accordance with English public policy, that the property of an enemy left in this country at the outbreak of war should be more than protected, and that it would be wrong to give to the enemy any accretion in value which arose during the war, particularly where the accretion is due to the efforts of the English partner. Where this argument fails, in my opinion, is in the assumption that when the British subject partner annexes the partnership property and uses it as his own as from the date of the dissolution of the partnership he is protecting his late partner's property, even though he is prepared to pay the value of the assets as ascertained by a valuation made in the absence of the enemy partner. It is conceded that no portion of the enemy partner's property is to be confiscated by reason of the dissolution of his partnership by the declaration of war. Whether the judgment of Atkin J. offends against this rule can be tested, I think, by an inquiry into what the enemy partner's rights in relation to the partnership property would have been had the partnership been dissolved on the day preceding the declaration of war. Had this occurred the enemy partner's rights in relation to the partnership property would have been those indicated in ss. 38, 39, 42, and 44 of the Partnership Act, 1890, and by the general rule of law laid down in *Darby* v. *Darby* (1), that on the dissolution of the partnership all the property belonging to the partnership shall be sold, and the proceeds of the sale after discharging all the partnership debts and liabilities shall be divided among the partners according to their respective shares of the capital. The declaration of war immediately following on the dissolution of partnership in the case I am putting would have imposed certain disabilities upon each of the partners which would have produced a complete deadlock. Neither could communicate with the other if the enemy partner was resident in the enemy country; neither could apply to the Court for a winding up order;

(1) 3 Drew. 495, 503.

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the British subject partner could only continue to trade with the partnership assets for the purpose of winding up the partnership, and the enemy partner could not during the war be paid any proceeds of any sale of partnership property, or any profit made by a continuance of the trading. This unfortunate state of things cannot, however, in my opinion as between the two partners alter the rights which each one had as against the other arising out of the dissolution. Does the fact that the partnership in the present case was dissolved by the declaration of war make any difference in the position of the partners from that which I have indicated where a partnership is dissolved immediately prior to the declaration of war? I think not. In each case the rights of the parties flow from a lawful contract made in time of peace. The British subject partner in the present action is asking for a declaration of his rights, and he cannot, in my opinion, either increase his own rights in relation to the partnership property or diminish those of his late partner by pointing out that so long as the war lasts those rights can never be determined directly as between himself and his late partner by the usual process of winding-up, or by pointing out that he is faced with the difficulty of either closing the partnership business or trading with the partnership assets for the benefit of an enemy. This last difficulty has been removed by the recent Trading with the Enemy Amendment Act, 1916, which by s. 4 gives the Board of Trade power to vest the enemy partner's interest in the partnership in the custodian, as between whom and the respondent the partnership can be wound up in the ordinary way. This Act was not in force when this action was heard before Atkin J., though it came into force before he gave judgment. The effect, however, is only to relieve the British subject partner from some of the difficulties in which the declaration of war had placed him. It does not affect the rights of the partners inter se arising out of the dissolution.

In my opinion the judgment of the learned judge offends against the rule that enemy property is not confiscated by a declaration of war. I do not think that the learned judge could deprive the enemy partner of his right to have the partnership property sold and the assets applied in the first instance in payment of the debts of the partnership, or deprive the enemy partner of his share of any

profits made by carrying on the partnership after the dissolution. For these reasons I agree with the modification of the order proposed by Swinfen Eady L.J. It is not necessary to say anything with regard to that part of the case which refers to the agency, because there is no dispute between the parties as to the proper order to be made.

A. T. LAWRENCE J. read the following judgment:—In my opinion the judgment of Atkin J. is correct and should be affirmed. I express this opinion with great misgiving, since the Lords Justices take a different view.

It is common ground that the contract was dissolved on the outbreak of war, both as to the agency and as to the partnership. The plaintiff is an English company registered in England under the management and control of persons owing allegiance to the British Crown.

The defendant company is a German company registered in Germany under the management and control of persons owing allegiance to the sovereigns of Germany, and who are alien enemies. The state of war dissolved it because both agency and partnership in commerce involve intercourse between the parties to such contracts. The right to intercourse is essential to the continuance of either relationship. Furthermore, to continue to trade either as agent or as partner would be to commit the crime of trading with the enemy. To trade with the enemy was a misdemeanour at common law: see per Sir William Scott in *The Hoop* (1); *Potts* v. *Bell*. (2) The reason that trading with the enemy is a crime at common law is that it is an act against the interests of the State. A nation at war has three main elements of force—men, wealth, knowledge. Trading with the enemy tends to increase his stock of the two latter, and is therefore contrary to the interests of the State and the allegiance of the subject. If a subject sells to or buys from an enemy, he intends to benefit himself, but it is illegal because it may also benefit the enemy. If he makes a contract for the benefit of the enemy, he adds intent to benefit the enemy and thereby accentuates his crime. It is an a fortiori case. It is not the interest of the State to build up during war a fund for the

(1) (1799) 1 C. Rob. 196, 217. (2) (1800) 8 T. R. 548.

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enemy's use when peace comes. It cannot be avoided in some cases without confiscating the enemy property. In those cases only can it legitimately be allowed. If the fund became too large I apprehend that international financiers would find a way to utilize its credit even during the war. The Court below has confiscated nothing. It has given the enemy the value of his share in all the property, including machinery, plant, book debts, accrued profits, accrued interest, working capital, goodwill, and everything. Trading with the enemy is now a misdemeanour of far greater gravity, as it has been made punishable with penal servitude, or with imprisonment with hard labour, as from August 4, 1914 (4 & 5 Geo. 5, c. 87, s. 1, sub-s. 1 (*b*)). Sub-s. 2 of s. 1 enacts that any transaction or act prohibited by Proclamation shall be deemed to constitute the offence, with a proviso that it shall not be so deemed if it is permitted by or under such Proclamation. Upon August 5, 1914, a Proclamation had been issued which was restated and extended by the Proclamation of September 9, 1914. The Act above-mentioned came into force upon September 18, 1914. This Proclamation prohibited (save where expressly permitted by Royal licence) all persons resident or carrying on business or being within the King's dominions from clause 5 (1.) " paying any sum of money to or for the benefit of an enemy and " (9.) " entering into any contract with or for the benefit of an enemy." From the moment that war was declared the defendants became incapable of either suing in our Courts or of entering into or carrying out mercantile contracts with subjects of the Crown. A contract intended to be operative during war would be so illegal that no Court could recognize it even after peace had been restored: see *Evans* v. *Richardson* (1). The law on the effects of war upon a contract tending to restrain the full commercial freedom of action of British subjects is well stated in *Zinc Corporation* v. *Hirsch.* (2) It is quite true that our law does not operate to confiscate the property of alien enemies. In my opinion the judgment of Atkin J. does not confiscate or deprive the defendants of any property or right which remained theirs after the declaration of war. By it they are to have the value of their interest in everything—accrued profits, accrued interest, and goodwill, if any. The case put by Bankes L.J.

(1) 3 Mer. 469. (2) [1916] 1 K. B. 541; 32 Times L. R. 232.

of a voluntary dissolution occurring just before the war aptly illustrates the difference between this case and that. There the German partner would have a vested right to all the same remedies as the English partner. The remedies might be suspended, but they would exist, and the dissolution sections of the Partnership Act, 1890, would apply as much to the one as to the other partner. Here there is no such vested right. The partnership is dissolved because it is illegal. The King's Court cannot foster, assist, or connive at the continuance of an illegal relation. It cannot, in my opinion, give an alien enemy profits which accrue after the relation of partner has become illegal. Any right either to profits or to interest must depend either upon statute or upon contract. I know of no statute giving an alien enemy interest or profits during war; profits under and interest issuing from a contract cannot continue to flow when the contract itself has been dissolved because of its illegality. The case is quite different where the contract is a legal contract the remedies upon which are merely suspended during war. As joint owner of the property, the plaintiffs were entitled to the use and enjoyment thereof, and no promise to pay any hire or rent can be implied. The value as at the outbreak of war of their share gives the defendants all they can ask. Mr. Lilley suggested that the order deprived the defendants of their right to have the value of the business realized by sale. This is to my mind regarding war as though it were peace. The answer is that there is no such right in the defendants. The Partnership Act, s. 39, applies only to persons within the King's allegiance. It does not say or suggest that an alien enemy "may apply to the Court." Sect. 34 has already dissolved the partnership because it has become "illegal."

The subsequent sections are not enacted by way of proviso upon s. 34. They are independent enactments applicable only to the relations of lawful partners. Moreover, it is a mistake to suppose that "wind up" in s. 39 necessarily involves a sale of the business. It is in the discretion of the Court to make such order for winding up as the justice of the case requires. There is no inflexible rule that the Court must order a sale in all cases: see *Syers* v. *Syers*. (1)

In many cases the Court is compelled to order a sale because there is no other mode of ascertaining the value of the shares. There is

(1) 1 App. Cas. 174, 183, 191.

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no independent person who can estimate the value of the business, so it has to be estimated or assessed by the bidders at an auction. Here sale would be unjust, for the defendants cannot bid by themselves or by an agent. On the other hand, the custodian (5 Geo. 5, c. 12, s. 1) can estimate the value and can arrange for such payment to himself as will, while safeguarding the interests of the defendant, not arrest or cripple the business of the plaintiff. If any difficulty should arise, the custodian can get an order to sell under 5 Geo. 5, c. 12, s. 4, sub-s. 1. A Court in making such an order would bear in mind the fact that it is one of the objects of war to protect and foster our own commerce. Another difficulty which has been suggested is that the order appealed against does not provide for the discharge of the trade debts of the business. This is true; it does not expressly do so; but no such provision appears to have been asked for below, and I have no doubt it was assumed that these debts would be discharged in working out the necessary arrangements with the custodian. It should be done, and the custodian can apply to the Court to make provision for it if it is not done to his satisfaction by the plaintiffs. If the contrary view to that which I have expressed above is correct, this astonishing result will follow: The English partner will have throughout the war to employ all his commercial skill and energy and all his workmen's labour in making profits one half of which will, unless by Order in Council the King should otherwise direct (5 Geo. 5, c. 12, s. 5), be payable at the end of the war to or for the benefit of men who may be at this moment fighting against us. This, applied to coal and steel works employing thousands of hands, seems to me contrary to the true interest of the State, and I can find no support for it anywhere save in a dictum of Lord Parker of Waddington in the *Daimler Case.* (1) He there says: "The prohibition against doing anything for the benefit of an enemy contemplates his benefit during the war and not the possible advantage he may gain when peace comes." This must be read secundum subjectam materiam; he was dealing with the argument that an English company having one enemy shareholder would be compelled to close its works. In the case supposed the contract would not be made for the benefit of the alien enemy shareholder, but for the benefit of the company

(1) [1916] 2 A. C. 307, 347.

itself. There are many cases in which an enemy may derive benefit from property during war—for example, the rents and profits issuing from real estate, the produce of live stock, the dividends from funds invested before the war. These can be properly received and handed over to the custodian. They involve no act intentionally done from which the enemy must derive direct benefit; but to say that the plain language of the criminal law can be ignored cannot have been intended. It has been suggested that 5 Geo. 5, c. 12, s. 2, sub-s. 1, is contrary to what I have said above. I do not think this is so. It applies to cases where a licence has been obtained. The Proclamations of August 5 and September 9, 1914, both contemplate and provide for trading by Royal licence, and we know that many such licences have in fact been granted, as has been usual in other wars.

Nothing I have said applies to acts done under a licence. In any case, it is clear that 5 Geo. 5, c. 12, does not expressly repeal the "principal Act," 4 & 5 Geo. 5, c. 87, and it could only do so by implication if its enactments were in direct contradiction of the principal Act. Its provisions seem to me appropriate to provide for the handing over to the custodian of the "dividends, interest, or share of profits" of licensed concerns. The Act contains no provision making the custodian accountable to the enemy property owner for interest, or giving such owner any right to interest. The custodian must deal with all interest or dividends arising from his investment of the fund in such manner as the Treasury may direct (s. 1, sub-s. 4). The judgment below should in my opinion be affirmed and the appeal dismissed.

Appeal allowed in part.

Solicitors for plaintiffs: *Burn & Berridge.*
Solicitors for defendants: *Herbert Smith, Goss, King & Gregory.*

W. J. B.

1916
Oct. 16, 17, 18, 31.
1917
Jan. 11.

WILSON BROTHERS BOBBIN COMPANY, LIMITED *v.* GREEN.

[1915 W. 173.]

Insurance (Marine)—Suing and Labouring Clause—Expense of Storage and Reshipment of Goods.

By a policy of marine insurance underwritten by the defendant the plaintiffs were insured in respect of a wood cargo laden on a Norwegian ship for a voyage from a Baltic port to an English port. The policy, which contained the usual suing and labouring clause, was against war risk only, and excluded all claims arising from delay. Shortly after sailing in November, 1914, the ship was stopped by German war vessels, and the master was told that as wood had been declared contraband by the German Government the ship would not be allowed to pass the Sound. The ship put into a Norwegian port, where the cargo was discharged and stored for some time, but was subsequently reshipped and forwarded to its destination in England:—

Held, that under the suing and labouring clause the plaintiffs were entitled to recover the cost of storage for a reasonable time and the proper cost of forwarding the cargo to its port of destination at the expiration of that time.

Great Indian Peninsula Ry. Co. v. *Saunders* (1861) 1 B. & S. 41; (1862) 2 B. & S. 266 distinguished.

ACTION tried by Bray J.

The plaintiffs, who were the owners of 600 standards of birch squares shipped on board the Norwegian steamship *Aranda* for a voyage from Raumo in the Baltic to Garston, sued the defendant, one of the underwriters of a policy on the goods, to recover (1.) his proportion of their value on the ground that there had been a constructive total loss thereof, and (2.) certain expenses under the suing and labouring clause in the policy.

The policy was "against war risk only as excluded by the f.c. and s. clause in marine policies, including risk of mines, torpedoes, and bombs," but "excluding all claims arising from delay." It contained the usual suing and labouring clause.

The *Aranda* sailed from Raumo on November 22, 1914, and on

November 25 was stopped by German war vessels, and, on the ground that wood goods had been declared contraband by Germany, the master was told that the *Aranda* would not be allowed to pass the Sound. On December 15, 1914, she put into Grimstadt, a Norwegian port, and landed the cargo, the discharge being finished on January 15, 1915. On December 3, 1914, the plaintiffs, alleging that the further carriage of the goods to this country had become impossible, gave notice of abandonment, but the defendant refused to accept it, agreeing, however, that the plaintiffs should be in the same position as if a writ had been issued on that date.

For a time it was thought that the Norwegian Government, which had given a guarantee to the German Government that the *Aranda* should discharge the cargo at Grimstadt, would prevent it being reloaded and sent on to England during the period of the war, but in February, 1915, it was ascertained that the plaintiffs were free to have the wood sent on to England, and accordingly in March they began to make inquiries about tonnage, but it was not till September that they in fact chartered a small vessel, the *Jens Riis*, which carried about 70 to 100 standards, but refused to make a second voyage. Thereafter another vessel, the *Munk*, carried the cargo, not to Garston direct, but to an east coast port, whence it was forwarded to Garston.

In July, 1915, the action came on for hearing on the claim to recover as for a constructive total loss. Bray J. then held that on December 3, 1914, it could not be said that the total loss of the venture was unavoidable, or that it was unlikely that the goods could reach their destination in England. He accordingly decided that the claim for a constructive total loss failed.

In October, 1916, the claim to recover under the suing and labouring clause the cost of storing the cargo at Grimstadt and forwarding it to this country came on for hearing.

Leslie Scott, *K.C.*, and *Keogh*, for the plaintiffs.

Leck, *K.C.*, and *R. A. Wright*, for the defendant. The claim to recover the expense of storage and forwarding is expressly excluded by the terms of the policy as the claim arises from delay. Moreover, the moment the goods were stored the peril insured against, namely, war risk, had ceased to operate, and therefore the expense of storage

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and reshipment does not come within the suing and labouring clause: *Great Indian Peninsula Ry. Co.* v. *Saunders.* (1)

[BRAY J. In order that the adventure might be concluded, was it not necessary that the cargo should be stored? The real question is whether you may sue and labour to save the adventure when the goods are safe.]

The cost of forwarding was held not recoverable in *Great Indian Peninsula Ry. Co.* v. *Saunders* (1), and the cost of storage is on the same footing. [*Becker, Gray & Co.* v. *London Assurance Corporation* (2) and *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* (3) were also cited.]

[They also argued that the plaintiffs were bound by s. 78, sub-s. 3, of the Marine Insurance Act, 1906, to minimize the loss, and if they had acted with reasonable diligence the cargo could have been reshipped much earlier than it was and at a much lower freight, but it is unnecessary to set out the argument on this point.]

Leslie Scott, K.C., in reply. When the goods were put in store at Grimstadt the risk of their total loss had not been finally averted; that risk did not cease till they reached their destination in this country. The storage was effected to safeguard the subject of the insurance and the expense is therefore recoverable. *Great Indian Peninsula Ry. Co.* v. *Saunders* (1) was wrongly decided, as it ignored the principle laid down in *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* (3), that what is insured is the venture. Even, however, if the case was rightly decided it is distinguishable, on the ground that the loss there was a particular average loss and the policy contained the clause "warranted free from particular average," whereas in the present case there is no such clause.

Cur. adv. vult.

1916. Oct. 31. BRAY J., after stating the facts, said: The claim for the expense of storage and reshipment may be dealt with together, and as to this Mr. Leck's first point was that as the claim arose from delay it was excluded by the express terms of the policy. In my opinion that point fails. I do not think the clause excluding

(1) 1 B. & S. 41; 2 B. & S. 266. (2) [1916] 2 K. B. 156.
(3) [1916] 1 A. C. 650.

all claims arising from delay affected in any way the suing and labouring clause. Mr. Leck's next point was much more serious. He said that the goods were safe when they were landed and stored at Grimstadt, and that there was no necessity to sue and labour at all, or that it was a case of suing and labouring to avert a loss which was not covered by the policy, and he relied mainly upon the case of *Great Indian Peninsula Ry. Co.* v. *Saunders.* (1) That case has to be very carefully considered. The facts were that the plaintiffs shipped at London for Bombay certain iron rails "freight for the said goods, to be paid here, ship lost or not." They paid the freight, and by a policy in the common form insured for the voyage the rails, valued at 4500*l.*, "warranted free from particular average, unless the ship be stranded, sunk or burnt." Soon after sailing the ship was, in consequence of damage by perils of the sea, compelled to put back to Plymouth in such a state as not to be worth repairing. The rails were landed and sent by the plaintiffs to London, and thence in other vessels to Bombay, the plaintiffs having to pay 825*l.* as freight. It was held that this extra freight was particular average and therefore within the warranty, and consequently was not recoverable from the underwriters, and, further, that the plaintiffs could not recover the amount under the suing and labouring clause. Blackburn J., in giving the judgment of the Court of Queen's Bench, said (2): "It was, however, further argued by Mr. James, that the plaintiffs were entitled to recover under the clause which authorizes the insured to sue and labour for the preservation of the subject-matter of the insurance. It is not necessary to decide whether an underwriter on a policy against total loss only is, under this clause, liable for expenses incurred by the assured for the purpose of rescuing the subject-matter of an insurance from a state of peril which might have resulted in a total loss, but did not. There are reasons both for and against this stated by Mr. Phillips in his Treatise on Insurance, s. 1777; and the question seems never to have been actually decided. But in the present case it does not arise. The expenses here were incurred for the purpose of forwarding the subject-matter of insurance to its destination, at a time when the iron was not in any peril of total loss, either actual or constructive. Had the insured chosen, instead

(1) 1 B. & S. 41; 2 B. & S. 266. (2) 1 B. & S. 52.

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of paying this extra freight, to sell the rails in England, as he might have done if he pleased, he could have made no claim on the underwriters; for it would not have been a constructive total loss, according to *Rosetto* v. *Gurney* (1), unless the amount of the extra freight exceeded the value of the goods when forwarded, which is not the case here; and an actual total loss is out of the question. It seems to us that the plaintiffs here cannot in any view recover, unless we deprive the warranty of the effect which it was intended to have. We therefore give judgment for the defendant." Mr. Leslie Scott said that since *Sanday's Case* (2) that was no longer law. I do not think *Sanday's Case* (2) laid down new law at all. It was the law long before the passing of the Marine Insurance Act, 1906, that what was insured in a policy of this kind on goods was their safe arrival at the port of destination. In *Great Indian Peninsula Ry. Co.* v. *Saunders* (3) the unanimous judgment of the Court of Queen's Bench was affirmed by the Court of Exchequer Chamber (4), and I cannot at nisi prius say that it was wrongly decided; I am rather inclined to think that it was rightly decided. However, in my opinion it is clearly distinguishable. It was decided upon the ground that the loss was a particular average loss, and the policy contained a warranty that it was free from particular average. The policy in this case contains no such clause. If the loss was incurred by the perils insured against, namely, war risk, it covered particular average loss as well as total loss, and it seems to me that there was at all events a danger of a partial loss here. The goods were at Grimstadt, the port of destination was Garston, and the goods could not safely be got to Garston without incurring the expense of storage at Grimstadt and the cost of forwarding, and therefore, in my opinion, these were expenses (I will leave out the word " proper " for the moment) incurred in endeavouring to avert that loss.

[The learned judge then dealt with the evidence, and came to the conclusion that if the plaintiffs had acted with reasonable diligence they could have had a ship ready to load the cargo at Grimstadt for carriage to this country by April 15, 1915, at a lower rate of freight than they in fact paid, and that the expense of storage and

(1) (1851) 11 C. B. 176.
(2) [1916] 1 A. C. 650.
(3) 1 B. & S. 41.
(4) 2 B. & S. 266.

forwarding, a proportion of which they were entitled to recover from the defendant, must be calculated upon that footing.]

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1917. Jan. 11. The case was mentioned again on the figures as adjusted, and Bray J. gave judgment for the amount found due by the defendant, but as he had paid a larger sum into Court the usual order in such circumstances was made as to costs.

Judgment accordingly.

Solicitors for plaintiffs: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for defendant: *W. A. Crump & Son.*

J. S. H.

SOCIÉTÉ NOUVELLE D'ARMEMENT *v.* SPILLERS & BAKERS, LIMITED.

1917
Jan. 16, 17; *Feb.* 3.

[1916 S. No. 595.]

Shipping—General Average—Extraordinary and abnormal Peril—Presence of Enemy Submarines—Hire of Tug to tow Vessel—Contribution by Cargo Owners.

In pursuance of a charterparty a sailing vessel left San Francisco for Queenstown, and was there ordered to Sharpness in the Bristol Channel. The usual practice for a sailing vessel going from Queenstown to Sharpness is for her to be towed a short distance out of Queenstown and a short distance into Sharpness. The master of the vessel hired a Dutch tug to tow her the whole way from Queenstown to Sharpness, being of opinion that that course was necessary owing to the presence of enemy submarines in the neighbourhood. In hiring the tug the master acted on his own judgment and responsibility. Although the vessel passed through waters in which she anticipated submarines, she did not see one, and of vessels alleged to have been sunk or damaged in the waters through which she passed on her voyage three-quarters were steamships. The vessel always used a tug when entering or leaving port.

In an action brought by the owners of the vessel against the owners of the cargo for a general average contribution in respect of the hire of the tug:—

Held, that the claim could not be sustained, inasmuch as a general average expenditure must be incurred to avoid extra-

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ordinary and abnormal perils as distinguished from the ordinary and normal perils of the sea, and the risk of being attacked or destroyed by the King's enemies was not an extraordinary and abnormal peril upon a voyage of the kind during the war.

ACTION tried in the Commercial Court before Sankey J. without a jury. The plaintiffs' claim was for a general average contribution.

The following statement of the facts is taken in substance from the judgment of the learned judge :—

The plaintiffs, the Société Nouvelle d'Armement (incorporated according to the laws of France), were the owners of the French barque *Ernest Legouvé*, which had been chartered by the defendants, Spillers & Bakers, Limited, of Cardiff, to load a cargo of 3000 tons of barley, of which the defendants were owners, at San Francisco on November 9, 1914, for carriage to the United Kingdom. In pursuance of the charterparty the vessel left San Francisco, proceeded to Queenstown, and was there ordered to Sharpness in the Bristol Channel. She arrived at Queenstown about May 20, 1915, and while there the crew saw the dead bodies from the torpedoed *Lusitania* being brought ashore. The usual practice for a sailing vessel going from Queenstown to Sharpness is for her to be towed a short distance out of Queenstown and a short distance into Sharpness, making the intermediate part of the voyage under her own sails. The master hired a Dutch tug to tow him the whole way. He was of opinion that it was a necessary thing to do, having regard to the presence of enemy submarines in the neighbourhood. He said that for a week before his departure the weather had been calm, with wind from the south-east, and that, proceeding under his own sails, he would have been a better mark for submarines, not only on account of visibility, but because his progress would have been slower, and he would have been unable to alter his course rapidly from time to time to avoid torpedoes; and, further than that, he could go closer into the shore with the assistance of a tug. He also said that on May 26 there was a meeting of the crew (which was recorded in his log), when they refused to proceed unless he engaged a tug. The learned judge found as a fact that the master in hiring the tug acted on his own judgment and his own responsibility. A witness, Captain Symes, gave evidence to the effect that if he had been master of the vessel he would, under the circumstances, have

hired the tug. The vessel left Queenstown on June 1 and arrived at the Flat Holm, off Cardiff, on June 3. Although she passed through waters in which she anticipated submarines, she in fact never saw one. A list was produced of vessels alleged to have been sunk or damaged in these waters between May 20 and June 12. Three-quarters of them were steamships and not sailing ships. Further, during the period up to June 4 only one sailing vessel was torpedoed. He (the learned judge) had nothing to compare that list with. He did not know how many sailing vessels were in these waters at the time, and whether any of them took tugs to assist them on their voyage. He rather gathered from the log that the master passed sailing vessels which were proceeding under their own sails. The vessel always used a tug when entering or leaving port.

The plaintiffs claimed a general average contribution from the defendants in respect of the hire of the tug to tow the vessel from Queenstown to Sharpness. It was admitted by both parties that the question had to be decided by English law. The plaintiffs further claimed a general average contribution in respect of the hire of the tug by the master for the purpose of enabling the vessel to change anchorage at Queenstown from a position where she would be in danger at the turn of the tide, and this portion of the claim was not disputed by the defendants.

Roche, K.C., and *R. A. Wright*, for the plaintiffs. The tug was hired to tow the *Ernest Legouvé* from Queenstown to Sharpness owing to the imminent danger arising from the presence of enemy submarines in the neighbourhood. The expenditure was therefore incurred to avert a danger which was imminent to the ship and cargo. It is sufficient to give rise to a liability to make a general average contribution if the danger affects all the interests involved and the expenditure is extraordinary either in degree or kind and is incurred for the preservation of all the interests. Imminent peril means, not an extreme danger, but a real or substantial danger hanging over the ship and cargo: *Plummer* v. *Wildman* (1); *McCall & Co.* v. *Houlder* (2); *The Leitrim.* (3) The danger to the

(1) (1815) 3 M. & S. 482. (2) (1897) 66 L. J. (Q.B.) 408.
(3) [1902] P. 256.

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ship, freight, cargo and crew arising from the presence of enemy submarines would have been very great if the tug had not been hired in order to shorten the time the voyage would take, and also to enable the ship to alter her course rapidly. The expenditure or sacrifice need not be extraordinary in kind in order to amount to a general average act if it is extraordinary in degree: *The Bona.* (1) In ordinary circumstances the hire of a tug is an ordinary expenditure, but it was an extraordinary expenditure in the present case, as it would not have been hired had it not been necessary in order to avoid the danger arising from the presence of enemy submarines. It therefore gives rise to a general average contribution: *Ocean Steamship Co.* v. *Anderson.* (2) There was an obvious danger to the crew, and an expenditure incurred to avert danger to life is as much a general average act as one to avert danger to ship, freight, or cargo: *Montgomery & Co.* v. *Indemnity Mutual Marine Insurance Co.* (3) [Carver on Carriage by Sea, s. 391, and Lowndes on General Average, 5th ed., p. 43, were referred to.]

Leck, K.C., and *A. Neilson*, for the defendants. The defendants are not liable for a general average contribution in respect of the hire of the tug for towing the ship from Queenstown to Sharpness. A general average act is defined by s. 66, sub-s. 2, of the Marine Insurance Act, 1906, as taking place "where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure"; and by sub-s. 1 general average loss is defined (following *Birkley* v. *Presgrave* (4)) as "a loss caused by or directly consequential on a general average sacrifice." By French law it is enough to give rise to a general average claim if the expenditure incurred benefits all persons interested, but the English law is stricter than that of foreign countries. The shipowners may have been prudent in having their vessel towed from Queenstown to Sharpness, but it has not been shown by them that there was a danger to the ship and cargo which was averted by the hire of the tug. In order to give a right to a general average claim there must be not only a danger on a particular voyage but a danger to the particular ship which is avoided by the expenditure

(1) [1895] P. 125.
(2) (1883) 13 Q. B. D. 651.
(3) [1902] 1 K. B. 734, 740.
(4) (1801) 1 East, 220.

incurred. Whether the vessel by engaging the tug escaped the danger of submarines is a question of fact. Three-quarters of the vessels sunk were steamers. A sacrifice or expenditure, in order to amount to a general average act, must be made or incurred for the common preservation of ship and cargo : *Svensden* v. *Wallace*. (1) In the present case the expenditure was incurred in order that the ship might be taken rapidly from Queenstown to Sharpness, and was in the interests rather of the shipowners than the cargo owners.

R. A. Wright in reply. The words " a time of peril " in s. 66, sub-s. 2, of the Marine Insurance Act, 1906, mean a time in which a ship is in a position of danger, even though the danger does not, as events turn out, affect that particular ship. If it was a time of peril, it is not necessary for the plaintiffs to prove that the vessel was threatened with an attack by any particular submarine.

Feb. 3. The following judgment was read by

SANKEY J., who having stated the facts, continued : As to the claim for a general average contribution in respect of the hire of the tug to tow the *Ernest Legouvé* from Queenstown to Sharpness the plaintiffs contend that the expenses of the tug are general average expenses, that is to say, that they were properly incurred for the preservation and the safety of the adventure, and that therefore the defendants, the cargo owners, are liable to contribute their share, which is the sum sued for in this action.

Now it is first to be observed that both parties admitted that this question has to be decided by English law, and as the plaintiffs are French owners I may be allowed to say that the English law differs considerably from that of foreign countries. Before such expenditure can be recovered our law demands proof that it has been incurred to preserve the property which has been in peril, while the jurisprudence of other countries is satisfied with proof that it has been incurred to benefit the adventure. A definition of general average has been given by many English judges, but the most famous one is that of Lawrence J. in *Birkley* v. *Presgrave* (2), which has always been regarded as authoritative. It is, " All loss which arises in consequence of extraordinary sacrifices made or

(1) (1884) 13 Q. B. D. 69, 84. (2) 1 East, 220, 228.

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expences incurred for the preservation of the ship and cargo come within general average, and must be borne proportionably by all who are interested."

The Marine Insurance Act, 1906, by s. 66, sub-s. 2, has now enacted what is a general average act in the following words: "There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure." I think, therefore, the questions I have to decide are: (1.) Was the hiring of the tug extraordinary expenditure? (2.) Was the expenditure voluntarily and reasonably incurred at a time of peril?

As to (1.)—was the hiring of the tug extraordinary expenditure?—the law appears to stand as follows: Extraordinary expenditure must to some extent be connected with an extraordinary occasion. For example, an abnormal user of the engines and an abnormal consumption of coal in endeavouring to refloat a steamship stranded in a position of peril is an extraordinary sacrifice and an extraordinary expenditure: see *The Bona*. (1) A mere extra user of coal, however, in order to accelerate the speed of a vessel would not be a general average act. Suppose, for example, a vessel whose ordinary speed were seven knots were under a forced draught and an extra coal consumption to proceed at nine knots merely for the purpose of accelerating the voyage, or a sailing vessel with auxiliary steam were to use the auxiliary steam for the purpose of reaching port sooner. In neither case would the expenditure on extra coal be a general average act, though in both cases some of the risks of the voyage might have been minimized by the vessel being exposed to perils for a shorter period. Again, suppose the master instead of hiring a tug had purchased guns and hired a crew of gunners at Queenstown on the chance that he might be attacked by a submarine. I doubt if the expenses of the guns and gunners could have been recovered as a general average expenditure: see *Taylor* v. *Curtis*. (2) In that case, after elaborate and learned argument, it was held that "The expenditure of ammunition, in resisting capture by a privateer, the damage done to the ship in the combat, and the expense of curing the wounded sailors, are not the subject of general

(1) [1895] P. 125. (2) (1816) 6 Taunt. 608.

average by the law of England." It is not sufficient to say that the expenditure was incurred to benefit the property; it must be proved that it was abnormal in kind or degree and incurred to preserve the property.

As to (2.)—was the expenditure voluntarily and reasonably incurred at a time of peril?—the law appears to stand as follows. The word "peril" is used in the statutory definition without any qualification, although in many of the definitions given of general average it is stated that the peril must be imminent, which means that it must be substantial and threatening and something more than the ordinary peril of the seas: see *Covington* v. *Roberts*. (1) It is not desirable, even if it were possible, to define the degree of danger or the amount of peril necessary. That is a question of fact depending alike on time and circumstance, upon which each judge must form his own conclusion. In some cases, as for example where a ship is stranded or sinking, the question approaches a certainty and the decision presents no difficulties. It is far otherwise where, as here, the question depends to some extent on a contingency and quits the realms of certainty for those of conjecture.

To sum up, there must be expenditure abnormal in kind or degree, and it must have been incurred on an abnormal occasion for the preservation of the property. In this particular case I am left in an uncertain position. It is true that I had the evidence of Captain Symes, who gave it as his opinion that if he had been master of the vessel under the circumstances he would have taken the tug, but I must look more closely into the facts. The vessel left Queenstown on June 1 and arrived at the Flat Holm, off Cardiff, on June 3. Although she passed through waters in which she anticipated submarines, she in fact never saw one. A list was shown to me of vessels alleged to have been sunk or damaged in these waters between May 20 and June 12. I do not propose to refer to the names of these vessels or the places where they were torpedoed. It is sufficient to say that three-quarters of them were steamships and not sailing ships. Further than that, during the period up to June 4 only one sailing vessel was torpedoed. I have nothing to compare this list with. I do not know how many sailing vessels

(1) (1806) 2 Bos. & P. N. R. 378.

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were in these waters at the time and whether any of them took tugs to assist them on their voyage. I should rather gather from the log that the master passed sailing vessels which were proceeding under their own sails. Under these circumstances it is very difficult to say that the *Ernest Legouvé* was or would have been in such peril as to justify the expenditure on the tug being treated as a general average act.

It must further be remembered that the plaintiffs always used a tug when leaving or entering port, and are only claiming in respect of a user for the purpose of accelerating the intermediate voyage, a position not unlike that of a ship with auxiliary steam above referred to. General average expenditure must be incurred to avoid extraordinary and abnormal peril as distinguished from the ordinary and normal perils of the sea, and in my view in the present case the risk of being attacked or destroyed by the King's enemies was not an extraordinary and abnormal peril: see *Taylor* v. *Curtis* (1), where Gibbs C.J. says: "The measure of resisting the privateer was for the general benefit, but it was part of the adventure. No particular part of the property was voluntarily sacrificed for the protection of the rest. The losses fell where the fortune of war cast them, and there, it seems to me, they ought to rest. It therefore follows, that these losses were not in the nature of general average, and that the plaintiffs cannot recover." It is the duty of the master to carry the cargo safely if he can, and I do not think he did anything here in excess of his duty, or that he was exposed to any danger other than that usual and anticipated on such a voyage at such a time. I am satisfied that the act of the master may have minimized the risk, and that was undoubtedly a benefit to the property, but it is impossible to say that it preserved it in a time of peril. While it is true that proof of minimization of risk may in some cases be equivalent to proof of preservation of the property, I cannot find that it reaches that standard in the present case.

In my opinion this part of the plaintiffs' claim fails, and my judgment with regard to it must be for the defendants.

As to the claim of the plaintiffs for a general average contribution to the hire of the tug to shift the *Ernest Legouvé* in Queenstown

(1) 6 Taunt. 608, 624.

harbour from a place of peril to a place of safety, which portion of the claim the defendants did not contest, there must be judgment for the plaintiffs.

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Judgment accordingly.

Solicitors for plaintiffs: *Ballantyne, Clifford & Hett.*
Solicitors for defendants: *Thomas Cooper & Co.*

J. E. A.

[IN THE COURT OF APPEAL.]

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Jan. 23, 24, 25; *Feb.* 26.

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[1915 L. 993.]

Insurance (Marine)—Proximate Cause of Loss—Perils of the Sea—"Warranted free from all consequences of hostilities"—Ship torpedoed by Enemy—Ship brought into Harbour—Subsequent Loss through Sinking.

A ship was insured with the defendants by a time policy against (amongst other things) perils of the seas. The policy contained the following clause: "Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of hostilities, or warlike operations, whether before or after declaration of war."

The ship, while on a voyage from South America to Havre, was at about mid-day on January 30, 1915, torpedoed by a German submarine 25 miles from Havre. The torpedo struck her well forward, and she began to settle down by the head. She kept afloat, and with the assistance of tugs she reached Havre on the evening of the same day. She was drawing too much water to enter the inner harbour or to be docked, and she was taken alongside a quay in the outer harbour. The weather became stormy, and owing to the swell coming into the harbour she began to bump against the quay and against a pumping vessel alongside of her; and the harbour authorities, fearing that she would sink at the quay, which was used solely for British Army and Red Cross purposes, and thus block it, ordered her to a berth inside the outer breakwater, where she was moored. She remained there for two days, taking the ground forward on each ebb tide, but floating again with the flood, until on the morning of February 2 her bulk-

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heads gave way, and she did not float again and became a total loss. In an action by the shipowners on the policy to recover as for a loss by perils of the seas :—

Held, that, as the ship was never out of immediate danger from the damage caused by the torpedo to the time of her final loss, the torpedoing was the proximate cause of the loss, and that the defendants therefore were protected by the warranty against "all consequences of hostilities or warlike operations."

Reischer v. *Borwick* [1894] 2 Q. B. 548 followed.

APPEAL from the judgment of Rowlatt J. at the trial of the action without a jury.

The action was brought on a policy of marine insurance effected by the plaintiffs with the defendants to recover 2425*l.* for a total loss of the steamship *Ikaria*. The policy was a time policy for twelve calendar months from noon on May 24, 1914, to noon on May 24, 1915, for 2425*l.* upon the steamship *Ikaria*, valued at 35,000*l.* The perils insured against were "perils of the seas" and a number of other enumerated perils, and "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance or any part thereof." The policy was subject to the Institute Time Clauses, as attached, one clause of which was as follows : "Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of hostilities, or warlike operations, whether before or after declaration of war."

The facts are fully stated in the judgments of Swinfen Eady and Scrutton L.JJ., and it is only necessary to state them shortly as follows : On January 30, 1915, about mid-day, the *Ikaria*, while on a voyage from South America to Havre and London, was torpedoed by a German submarine about 25 miles from Havre. The torpedo struck the *Ikaria* on the port side abreast of No. 1 hatch 4 feet below the water line, and made a large hole in her side, through which the water came and filled No. 1 hold, and she began to settle down by the head. The forepeak was about half full of water, and there was water in No. 2 hold. As the vessel appeared to be sinking the captain and crew left her, but seeing that the sinking was arrested they went on board again. The water was kept under by pumping, and she was navigated under her own steam with

the assistance of tugs to Havre, and was berthed alongside the Quai d'Escale, in the outer harbour, on the evening of the same day. She could not go into the inner harbour or into dock on account of her draught forward. A pumping steamer came alongside and commenced pumping at once, and continued doing so all night. A gale sprung up on the evening of January 30 and increased on the 31st, and the swell rolled into the harbour, which was open to the sea from the west-north-west, the result being that the *Ikaria* and the pumping steamer kept bumping together and the *Ikaria* bumped against the quay. It was impossible to continue pumping operations. Part of her cargo had been discharged on the morning of the 31st, but this apparently did not lessen her draught forward. The harbour authorities fearing that she might sink at the quay and block the fairway to the inner harbour where the British naval transports and supply ships were docked, and might also block the Quai d'Escale, which was also used solely for military purposes, she was ordered to a berth at the Batardeau, the outside breakwater, where she was moored. There the *Ikaria* took the ground forward as the tide receded and floated again with the rise of the tide. On the next day, February 1, the vessel grounded by the head at each ebb tide for about four or five hours and floated again on the flood tide. On the morning of February 2 the engine-room forward bulkhead gave way, and when the vessel grounded forward she did not float again, though the after part remained afloat, and she became a total loss.

The plaintiffs claimed for a total loss by perils of the sea. The defendants contended that the loss was due to "consequences of hostilities" within the exception in the warranty. The evidence is discussed and the conclusions drawn therefrom are fully stated in the judgments. Rowlatt J. held that the defendants' contention was correct and gave judgment for them. The learned judge said that the conclusion he had come to was that if the vessel could have stayed at the Quai d'Escale she might ultimately have been lightened and got into dry dock and been safe; but that did not happen. The port authorities could not let her stay there, and sent her to the Batardeau, where she grounded by the head. She was lost because of two combined causes, the weakness of the bulkheads caused by the explosion and the groundings; she became

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a loss by reason of her grounding there in the condition in which she was. The case was this. The vessel was torpedoed; she never got to a place which was safe; she was never saved after being injured by the torpedo. He could not think that the grounding was a new matter intervening which caused the damage. All through she was under the operation of the original torpedoing, and all the efforts she made before she became a total loss were merely efforts to escape from that casualty in the grip of which she was throughout.

The plaintiffs appealed.

Leslie Scott, K.C., and *Raeburn*, for the plaintiffs. The *Ikaria* was lost by perils of the sea. If she had been allowed to remain at the Quai d'Escale she would, as the learned judge found, have been in safety. She was ordered to a place which was unfit for a vessel in her disabled condition, and where in consequence of her being down by the head she took the ground forward, and thus the vessel was so strained and the bulkheads so weakened that she became a total loss. She was a wounded ship when she came into Havre, but her mortal injury was caused partly by her bumping at the quay, and finally by her taking the ground in the outer harbour, in consequence of which her back was broken. The evidence shows that the bulkheads gave way in consequence of the grounding. There were three causes intervening between the torpedoing of the vessel and the sinking: first, the bad weather; second, the act of the harbour authorities in mooring her away from the quay; and, third, the grounding. The proxima causa must alone be looked at, and that was the grounding. In *Livie* v. *Janson* (1) a policy on ship and cargo from New York to London was warranted free from American condemnation. She left New York notwithstanding an embargo and was driven ashore by force of the ice and received partial damage. She was there seized by the American authorities and condemned. It was held that the immediately operating cause of the loss was the seizure and condemnation of the ship, and that therefore the underwriters were not liable. In *Ionides* v. *Universal Marine Insurance Co.* (2) a cargo was insured with a warranty "free from all consequences of hostilities." On

(1) (1810) 12 East, 648. (2) (1863) 14 C. B. (N.S.) 259.

the voyage the vessel went ashore on the coast of North Carolina during the war between the Northern and Southern States of America owing to one of the belligerents having extinguished the light on a dangerous headland. Three days afterwards the vessel broke up owing to bad weather. It was held that the proximate cause of the loss was a peril of the sea and not the hostile act of extinguishing the light. In *Pink* v. *Fleming* (1) goods were insured against damage consequent on collision. The ship was damaged by collision with another ship, and she had to go into port for repairs. It was necessary to discharge a portion of the cargo, and when the repairs were completed the goods were reshipped. The goods, being perishable, were damaged by the handling necessary for their discharge and reshipment and by the delay. It was held that the handling, and not the collision, was the proximate cause of the loss. Lord Esher M.R. pointed out that where there is a succession of causes the last cause only must be looked to and the others rejected, although the result would not have been produced without them. So, too, in *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (2) cargo damaged by sea water coming through a hole gnawed by rats in a pipe was held to be within the exception in a bill of lading of "dangers and accidents of the seas" as being the proximate cause of the damage. The only case which seems to contravene the rule is *Reischer* v. *Borwick* (3), but that case can only be reconciled with the other cases by saying that there was no new intervening cause. If that is not the explanation of the decision, it is inconsistent with the other cases and ought not to be followed. There being a prima facie loss by perils of the sea, it lies on the defendants to prove that the loss was proximately caused by an excepted peril. They have to prove a loss within the exception. The burden of proof is material in this case, because Rowlatt J. found upon the evidence that the ship was lost owing to two combined causes, namely, the weakness of the bulkheads due to the explosion and the grounding. The defendants, having to prove a loss by torpedoing, have not discharged that burden by proving a loss from two combined causes. As Lord Penzance said in *Dudgeon* v. *Pembroke* (4), "A long course

(1) (1890) 25 Q. B. D. 396.
(2) (1887) 12 App. Cas. 518.
(3) [1894] 2 Q. B. 548.
(4) (1877) 2 App. Cas. 284, 297.

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of decisions in the Courts of this country has established that causa proxima et non remota spectatur is the maxim by which these contracts of insurance are to be construed, and that any loss caused immediately by the perils of the sea is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it." That applies to this case. The damage by the torpedo had ceased to make the loss of the ship inevitable, and therefore the fact that the structure of the ship was weakened and made the loss by perils of the sea more easy is not material. The grounding in fact caused the loss. The loss was therefore caused by perils of the sea. [*Cullen* v. *Butler* (1), *Davidson* v. *Burnand* (2), *The Xantho* (3), and *The G. R. Booth* (4) were also referred to.]

R. A. Wright (*Roche, K.C.*, with him), for the defendants. Upon the evidence it is clear, and it is so found by the learned judge, that the damage done by the torpedo continued to operate throughout and was the direct cause of the loss. The damage extended to the bulkhead between Nos. 1 and 2 holds, which was weakened by the explosion, and ultimately gave way and caused the ship to sink. All the acts done after the ship was torpedoed were salvage acts and were unsuccessful. The loss therefore comes within the exception of "consequences of hostilities." In *Dudgeon* v. *Pembroke* (5) and *Woodside* v. *Globe Marine Insurance Co.* (6) there was no excepted peril which concurred in causing the loss, and in *The Xantho* (3) Lord Herschell was not distinguishing between two or more causes of the loss. If the loss in the present case arose from two concurrent causes, the exception in the warranty relieves the defendants if the proximate cause of the loss was a war peril. The torpedoing of the ship was the proximate cause of the loss: *Reischer* v. *Borwick.* (7) Proximate cause is not limited to the immediate and instantaneous cause, but extends to a cause still in operation when the actual loss occurs. "The rule," as Lindley L.J. said (8), "is based on the intention of the parties as expressed in the contract into which they have entered; but the rule must be

(1) (1816) 5 M. & S. 461.
(2) (1868) L. R. 4 C. P. 117.
(3) (1887) 12 App. Cas. 503.
(4) (1898) 171 U. S. 450.
(5) 2 App. Cas. 284.
(6) [1896] 1 Q. B. 105.
(7) [1894] 2 Q. B. 548.
(8) [1894] 2 Q. B. 550.

applied with good sense, so as to give effect to, and not to defeat, those intentions." And later on (1): "The fact that some fresh cause arises, without which the injury would not have led to further loss, is, I think, in such a case far from conclusive. Assume that this ship would have floated in calm water notwithstanding the injury she had sustained by the collision, and suppose that, before such injury could be made good, the water became so rough as to get into her and sink her, by reason only of her injured condition, such loss would, in my opinion, be proximately, though not exclusively, caused by the collision. . . . . It appears to me, however, that an injury to a ship may fairly be said to cause its loss if, before that injury is or can be repaired, the ship is lost by reason of the existence of that injury—i.e., under circumstances which, but for that injury, would not have affected her safety." Where, for instance, a ship is torpedoed at sea, and attempts are made to bring her into harbour, but before she is got in she sinks through sea water entering by the hole, it is submitted that the proximate cause of the loss is the torpedoing and not a peril of the sea. The peril of the sea may be a co-operating cause, but it is not the proximate cause, and, proximate cause being excepted, the assured cannot recover on the policy. The American decisions of *Insurance Co.* v. *Boon* (2) and *The G. R. Booth* (3) support this contention. The object of the warranty is to except such losses as would otherwise come within the express terms of the policy: *Cory* v. *Burr.* (4)

With regard to the decision in *Pink* v. *Fleming* (5), which is relied upon by the plaintiffs, in that case none of the specified perils operated on the goods insured, and neither the handling of the goods nor the delay, each of which contributed to cause the damage, was covered by the policy. In *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (6) if the bill of lading had contained an exception of damage by rats that would probably have been held to be the proximate cause of the loss. In *Ionides* v. *Universal Marine Insurance Co.* (7), as Willes J. said, the absence of the light may have been the cause of the vessel being destroyed, but it was not the proximate and

(1) [1894] 2 Q. B. 551.
(2) (1877) 95 U. S. 117.
(3) 171 U. S. 450.
(4) (1883) 8 App. Cas. 393, 397.
(5) 25 Q. B. D. 396.
(6) 12 App. Cas. 518.
(7) 14 C. B. (N.S.) 259, 289.

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absolute certain cause of the loss. In the present case the torpedoing of the ship was the proximate and absolute certain cause of the loss. The defendants, therefore, are not liable. [*Butler* v. *Wildman* (1), *Lawrence* v. *Aberdein* (2), *Gabay* v. *Lloyd* (3), *St. Paul Fire and Marine Insurance Co.* v. *Morice* (4), and Arnould on Marine Insurance, 9th ed., s. 905, were also referred to.]

Raeburn in reply. The effect of the warranty is to delete from the policy some of the risks which otherwise would be within it. If there can be two proximate causes of the loss—as seems to be thought in Arnould on Marine Insurance, 9th ed., s. 822, citing *Reischer* v. *Borwick* (5)—the assured can rely upon either of those causes. If the plaintiffs can show a loss by a peril remaining in the policy after the deletion of perils by the f.c.s. clause, they can recover. The plaintiffs here can rely upon a loss by perils of the sea. The proper course is to take the last happening cause of the loss and to see if it comes within the policy.

Cur. adv. vult.

Feb. 26. SWINFEN EADY L.J. read the following judgment :— The plaintiffs' claim is for a loss under a time policy of marine insurance upon the steamship *Ikaria*. The case was tried without a jury before Rowlatt J., who gave judgment for the defendants, and the plaintiffs appeal.

The plaintiffs allege that the steamship sank and was lost through perils of the seas, being perils covered by the policy. The defendants deny this, and contend that the ship sank after and directly in consequence of being torpedoed off Havre by a German submarine, being a matter excepted from the policy by a warranty in the following form : " Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of hostilities, or warlike operations, whether before or after declaration of war."

On January 30, 1915, during the currency of the policy, the ship was on a voyage from South America to Havre and London with a cargo of sugar, cocoa, coffee, bran, and hides, when about 25 miles

(1) (1820) 3 B. & Al. 398.
(2) (1821) 5 B. & Al. 107.
(3) (1825) 3 B. & C. 793.
(4) (1906) 11 Com. Cas. 153.
(5) [1894] 2 Q. B. 548.

north-west of Havre the vessel was stopped to await a pilot just before half-past 12 (noon). Suddenly the captain and chief officer saw approaching the ship the wake of a torpedo, about 30 feet away forward of the port-beam, and almost immediately a great explosion occurred, the torpedo having struck the vessel on the port side abreast of No. 1 hatch. A large hole was made there in the side of the vessel, 3·15 metres wide and 2·6 metres high, 4 feet below the water line in her then trim; a huge column of water was sent up, which fell on deck and burst out the bulwarks on the port side; numerous pieces of the metal of the torpedo fell on the deck. The vessel began immediately to settle down by the head; according to the chief officer they sounded and found No. 1 hold filled with water, some water in No. 2, and the fore peak practically half full. The captain ordered the boats out, and as the vessel appeared to be sinking he and the crew left the ship and boarded a tug which was close by. The weather was fine and the sea smooth. About an hour later the vessel, although much down by the head, appeared to have stopped sinking, and the captain with part of the crew again boarded her, and with her own steam and the assistance of a tug and a mine-sweeper reached the outer harbour of Havre about 9.30 P.M., and was berthed at the extension quay (Quai d'Escale) shortly afterwards. At this time the vessel was some 17 feet down by the head. Previous to the injury her draught was 23 feet 6 inches forward, and 23 feet 9 inches aft; after the injury and when entering the harbour she was drawing 32 feet forward and 15 feet aft. She was drawing too much water to be able to proceed to the inner harbour or to enter a dry dock.

In the meantime instructions had been given to the *Salamander*, a pumping steamer, to get up steam, and this vessel came alongside as soon as the *Ikaria* was berthed at the Quai d'Escale, about 10.30 P.M., and commenced pumping at once, and continued to do so all night. Arrangements were also made with a stevedore to bring a gang of men as soon as it was light on Sunday morning to discharge cargo forward in order to lighten her. The stevedore's gang commenced on Sunday morning about 7.30, but after discharging some sixty tons of cargo they were ordered to cease work between 11.30 A.M. and noon. On Saturday night a gale had sprung up and increased on Sunday; there was a great swell, and the

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pumping steamer was quite unable to continue her pumping operations alongside the *Ikaria*, the ships were bumping together, and the *Ikaria* bumping against the quay, the pumping connections were broken, and the weather was so bad that it was impossible to continue pumping. According to the master of the pumping steamer their pumps gained on the water at first, but not afterwards, as rivets were coming out and the ship was opening where she had been torpedoed, and was strained by the swelling of the cargo.

It is manifest from the evidence that the injury from the torpedo not only involved the collision bulkhead, but also extended to the bulkhead aft of No. 1 hold. There was considerable discrepancy between the ship's log and the engine log as to the effect of the ship's pumps. The latter records that on the day of the injury No. 2 hold was making water, with the ballast pump keeping it down. On the next day (Sunday) the water in the hold was gaining on the pump; at 11 A.M. 3 feet of water in No. 2 hold, at 1 P.M. 5 feet and still rising. The deck log gives quite a different story. But in any case the water was rising in the ship, when about noon on Sunday she was required to leave the Quai d'Escale. Between 11 A.M. and noon a conference of the port engineers of Havre took place, and it was then and there decided that it would be most dangerous to leave a ship in a sinking condition at the Quai d'Escale at the entrance to the inner harbour and docks, where if she sank she might obstruct the fairway and hinder the docking of the British naval transports and supply ships. The Quai d'Escale during the war is used entirely for military purposes, and is not a berth for ordinary merchant ships; the vessel was placed there temporarily owing to her injured condition with a view to saving her if possible. When it was seen that the salvage pumps had to leave her and that her head had not been raised appreciably by the cargo discharged, the risk of her sinking at that berth was too great to allow of her remaining there, and she was ordered to the "Batardeau," where she was moored. The same Sunday afternoon the ship took the ground forward as the tide receded, but floated again with the rise of the tide about 8 P.M. On Monday, February 1, the ship grounded at each ebb, but floated again with the flood tide. Early on the morning of Tuesday, February 2, the engine-room forward

bulkhead gave way, the ship grounded, and did not float again, and became a total loss.

The plaintiffs contended that the vessel was lost by perils of the sea; that the bulkhead between No. 1 and No. 2 hold remained substantially intact until the vessel broke her back after the third grounding; that the bulkhead gave way owing to the grounding and not from the pressure of water upon it; and that she was finally wrecked by reason of taking the ground at her forefoot while her stern was water-borne. The plaintiffs' case was that the judgment of Rowlatt J. was erroneous, as the vessel grounded at her anchorage in the outer harbour, near the breakwater, and in consequence became a total loss; that such grounding was an ordinary peril of the seas, for which the defendants were liable under the policy.

In cases of marine insurance it is well settled that it is only the proximate cause which is to be regarded, and that an underwriter is not liable for any loss not proximately caused by the perils insured against. This rule is based, as Lindley L.J. stated in *Reischer* v. *Borwick* (1), on the intention of the parties as expressed in the contract into which they have entered; but the rule must be applied with good sense, so as to give effect to, and not to defeat, those intentions. The policy, with the warranty, effects an insurance against perils of the sea other than such perils of the sea as are the direct and immediate consequence of hostilities or warlike operations. Where, in the case of a vessel at sea, sea water flows into her through an opening in such quantities that the vessel sinks and is lost, that is a loss through a peril of the sea. If the opening were made by a hostile shell or torpedo, and in consequence the vessel fills and sinks, the loss would still be by a peril of the sea, but, being the direct and immediate consequence of hostilities, such a loss would not be recoverable under a policy in the form of the present one.

In *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (2) the loss was through a peril of the sea, and none the less so because it was a rat which made the hole through which the sea water entered and occasioned the damage. In *Dudgeon* v. *Pembroke* (3) there was

(1) [1894] 2 Q. B. 550. (2) 12 App. Cas. 518.
(3) (1874) L. R. 9 Q. B. 581; 2 App. Cas. 284.

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a loss by perils of the sea, and the unseaworthiness of the vessel did not prevent the assured from recovering, as there was not any implied warranty of seaworthiness. In *Reischer* v. *Borwick* (1), if the policy had been against perils of the sea with an exception of or warranty against damage received in collision with any object and the consequences thereof, the assured would not, in my opinion, have been entitled to recover.

As the policy against sea perils in the present case contained a warranty against all consequences of hostilities or warlike operations, the question arises, Was the loss, assuming it to be by a peril of the sea, the proximate consequence and effect of hostilities? The facts show that the vessel was severely damaged by a torpedo, and that, although every effort was made to save her, she sank and was lost early on the third day afterwards. If to prevent her sinking she had been run ashore immediately after the accident and had become a total loss, the loss would certainly have been the direct consequence of hostilities. Does it make any difference that between two and three days were spent in abortive and unavailing efforts to save her? She was in imminent risk of sinking from the moment of being injured; she was removed from the Quai d'Escale because of the evident risk of her sinking there; she was unable to remain at that quay, and never was able to reach and remain in any place of safety; the fact that she was so much down by the head prevented her removal to the inner harbour; she had the choice of going outside the breakwater with a view to being beached, or of remaining within the outer harbour; the latter was chosen, but, having regard to her draught, she was bound to ground at every tide at the place where she was moored, unless she could be considerably lightened and her draught lessened, which proved to be impracticable. The risk of her grounding there was deliberately incurred as part of the salvage operations. The train of causation from the act of hostility to the loss was unbroken. She was never out of immediate danger from the time she was first injured to her final loss, and the efforts to save her were acts done by way of salvage. There was not any new intervening cause of loss after the injury by torpedo, no new casualty causing the damage. In my opinion the judgment

(1) [1894] 2 Q. B. 550.

appealed from was right and should be affirmed, and the appeal dismissed.

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BANKES L.J. read the following judgment:—In this case the main ground upon which the appellants base their appeal is that the learned judge drew a wrong inference from the facts. They contend that he ought to have come to the conclusion that the proximate cause of the loss of the vessel was her taking the ground after she had been removed from the Quai d'Escale. They further contend that the learned judge ought to have come to the conclusion upon the evidence that the injury to the vessel caused by the torpedo had ceased to be an actively operating source of danger from the moment the vessel was moored at the Quai d'Escale, and that what happened to her afterwards must be considered as a fresh cause of injury quite independent of what had happened previously. They further contend that the taking of the ground by the vessel under the circumstances described in the evidence was quite sufficient to break her back, even if she had not met with any previous injury from being torpedoed. These contentions raise questions of mixed fact and law. So far as the questions of fact are concerned, I entirely agree with the conclusions arrived at by the learned judge. The appellants' case on the facts depends very largely upon their being able to establish that the bulkhead separating Nos. 1 and 2 holds was left after the explosion of the torpedo in such a sound condition that the vessel would certainly have remained afloat after her removal from the Quai d'Escale had it not been for her taking the ground in the way she did. It is not necessary to go through all the evidence. It is sufficient to say that I cannot come to that conclusion. I think that the presence of water in No. 2 hold directly after the explosion, the character of the explosion itself, the action of the harbour authorities, who evidently regarded the vessel as doomed, all tend to render the chief engineer's account of the condition of things as contained in his log more probable than that of the captain and chief officer. As a result of a careful consideration of all the evidence, I have come to the conclusion that the view of the learned judge was right when he says that the loss of the vessel was due to two combined causes operating simultaneously, namely, the weakness of

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the bulkheads, the result of the explosion, and the taking of the ground by the vessel. In other words, the learned judge finds that the injury caused by the torpedo was an actively continuing source of danger to the vessel which actually contributed in part to her loss. In this conclusion of fact I agree.

I cannot agree with the appellants' contention that, because the vessel had arrived at a place, namely, the Quai d'Escale, which would have been a place of safety had she been allowed to remain there, the case is therefore to be treated as though the vessel had arrived at a place of safety, or with the contention that in any decision upon the facts of this case her removal from the quay must be treated as a point of fresh departure, and that any injury to the vessel before that time must be excluded from consideration. The learned judge appears to me to supply a sufficient answer to these contentions when he says that you do not reach a place of safety unless you are allowed to remain there a sufficient time to ensure safety. Another answer might be supplied by treating the operations at the quay as salvage operations, which, owing to no neglect or default of the shipowner or his servants, could not be continued for a sufficiently long period to secure the safety of the vessel.

It was not disputed that in the view of the facts taken by Rowlatt J. this case is covered by the authority of *Reischer* v. *Borwick*. (1) It was contended that the decision in that case could not be reconciled with *Pink* v. *Fleming* (2) and with other cases in which on claims on policies or on bills of lading the question of the proximate cause of a loss has been considered. It may be that the Court of Appeal in *Reischer* v. *Borwick* (1) took a certain view of the facts of that case which had not previously been discussed in other cases; but the authorities to which we were referred do not seem to me to be irreconcilable. They may, I think, be divided into classes. There is first of all the class where the loss complained of was the result of a cause not covered by the policy, though that cause was clearly consequent upon a cause which was covered by the policy. *Pink* v. *Fleming* (2) is a good illustration of this class. The injury to the goods was the result of their being handled. This was the sole cause, and the proximate cause also, of the loss, though the necessity

(1) [1894] 2 Q. B. 548. (2) 25 Q. B. D. 396.

for handling the goods was consequent upon an injury to the vessel caused by perils of the sea. Another class of cases consists of those in which the policy contains no warranty or exception material to be considered, and where, therefore, the only question is whether upon the facts it can be said that the loss was covered by the contract. To this class of case the language of Willes J. in *Grill* v. *General Iron Screw Collier Co.* (1) directly applies. He says: "A policy of insurance is an absolute contract to indemnify for loss by perils of the sea, and it is only necessary to see whether the loss comes within the terms of the contract and is caused by perils of the sea: the fact that the loss is partly caused by things not distinctly perils of the sea, does not prevent its coming within the contract." Lord Herschell cites this passage with approval in *The Xantho.* (2) A good illustration of this class of case is afforded by *Dudgeon* v. *Pembroke.* (3) In that case the vessel was unseaworthy and was lost by perils of the sea because she was unseaworthy; but, inasmuch as the policy was a time policy which contained no warranty of seaworthiness, the assured were held entitled to recover. *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (4), though an action on a bill of lading, may, I think, be considered as being in the same class. Had the bill of lading in that case contained an exception of injury by rats, the same considerations would have applied as, in my opinion, apply to a third class of cases, namely, those where the policy contains some warranty or exception. The present case falls within this class. The warranty is in these words: "Free from all consequences of hostilities or warlike operations." The presence of this clause renders it necessary to inquire not only whether but for the exception the loss would be covered by the contract, but also whether the loss has in whole or in part been caused by an excepted peril. If the result of the latter inquiry is that it has been so caused, it seems to me that the loss is not covered by the policy. In this connection it becomes necessary to consider a passage in the speech of Lord Bramwell in *The Xantho.* (5) In speaking of the collision in that case he speaks of it as a causa sine qua non, but not the causa causans.

(1) (1866) L. R. 1 C. P. 600, 611.
(2) 12 App. Cas. 510.
(3) L. R. 9 Q. B. 581 : 2 App. Cas. 284.
(4) 12 App. Cas. 518.
(5) 12 App. Cas. 514.

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It was, he says, the causa remota, but not the causa proxima: the causa proxima of the loss was foundering. If that dictum is applicable to the facts of this case, it would be a weighty authority. In the case of a collision where a vessel is injured to such an extent that the inrush of water is sufficient to sink her in a few minutes, it seems to me impossible to sever the causes of loss so as to be able to say that the inrush of water was the cause of the loss to the exclusion of the collision injury. Such a case appears to me to be necessarily one where the loss must be treated as due to the two causes operating simultaneously, neither of which can separately be considered as the cause, much less as the proximate cause, though the two combined may be treated as the proximate cause. In the case of *In re Etherington and Lancashire and Yorkshire Accident Insurance Co.* (1) Vaughan Williams L.J. says this: "In my opinion, it is impossible to limit that which may be regarded as the proximate cause to one part of the accident. The truth is that the accident itself is ordinarily followed by certain results according to its nature, and, if the final step in the consequences so produced is death, it seems to me that the whole previous train of events must be regarded as the proximate cause of the death which results." This view of the law is probably too widely expressed to be capable of general application, but the language of the Lord Justice, in my opinion, applies to the present case if the facts are interpreted as I interpret them and as the learned judge in the Court below interpreted them. The same reasoning appears to me to have been applied to the facts in the case of *Reischer* v. *Borwick* (2), and I see no ground why I should not be content to follow that decision, which does not appear to me to be inconsistent with previous decisions. I agree that the appeal fails.

SCRUTTON L.J. read the following judgment:—At mid-day on Saturday, January 30, 1915, the steamer *Ikaria* was torpedoed by a German submarine in the English Channel. She kept afloat and managed to reach Havre, her port of destination, that evening, but about 9 A.M. on Tuesday, February 2, she sank at her moorings in the outer harbour. Her owners, the Leyland Shipping Company, Limited, were insured against ordinary sea perils in the Norwich

(1) [1909] 1 K. B. 591, 599. (2) [1894] 2 Q. B. 548.

Union Fire Insurance Society, Limited, with a warranty "free of all consequences of hostilities," and also on another policy for a smaller amount against war risks. They sued the Norwich Company, alleging a loss by perils of the sea; the defendants reply that the loss was a consequence of hostilities. Rowlatt J. decided in favour of the defendants, and the shipowners appeal to this Court. The case gives rise to those difficult questions which have always to be considered when it is necessary to apply the well-known maxim that in matters of insurance causa proxima non remota spectatur.

The shipowners allege that the loss was caused by the entry of water into the No. 2 hold and engine-room in large quantities, that this entry was due to the giving way of two bulkheads, due in turn to three groundings on three tides at the second berth of the ship at Havre and a heavy swell at the first berth, and to the orders of the Havre authorities to the ship to move from her first berth, which orders were not in fact justified by the necessities of the case. This entry of water into hold No. 2 they say was the proximate cause, the torpedo damage which let water into hold No. 1 was only a remote cause, of the loss. The defendants reply that from the time of the explosion due to the torpedo the ship was a stricken or dying ship, and her subsequent history was merely unsuccessful attempts to save her. She sank because of and from the immediate and direct results of the hostile attack.

It is first necessary to consider the facts of the case, most of which are derived from printed or written evidence. The explosion at noon on Saturday, January 30, tore two large rents in the side of No. 1 hold, which at once filled with water. The forepeak leaked badly and became half full of water. A small quantity of water came into the bilges of No. 2 hold, but not above the tank tops. It came either from started rivets or a strained bulkhead between holds Nos. 1 and 2. The vessel settled by the head, and the crew left her, but finding she did not sink returned to her. Under her own engines, working slow, and with the assistance of a tug and mine-sweeper she proceeded towards Havre, which she reached that night between 9 and 10 o'clock. She was taken to a berth, the Quai d'Escale, in the harbour, outside the dock gates, and therefore exposed to any swell which might come from the sea outside. A salvage steamer began at once pumping at her fore-

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peak, and her ballast pump was working at No. 2 hold. To pump No. 1 hold was pumping the English Channel. At daylight a large number of men began discharging cargo from the forepeak and hold No. 1, and about sixty tons were got out. But the swell into the harbour rendered it difficult for the salvage steamer to work, and bumped the vessel against the quay. It was doubtful whether the vessel was doing more than hold her own as regards her draught forward. The berth where she was lying was the Red Cross berth of the British Army; Havre was their principal base, and a vessel sinking in that berth would seriously obstruct the navigable channel. The harbour authorities, in view of the national interests involved, were very prudently taking no risks; and at 11 A.M. they stopped discharging, and gave the ship the option of going outside the harbour to beach herself or do what she liked, or of mooring at a place they indicated inside the Batardeau, the outer breakwater, as sheltered as possible from the swell. The *Ikaria* anchored in this place at 1 P.M. on the Sunday, January 31. I do not think the ship's representatives thought she was going to take the ground, unless she sank. The captain wires on the Sunday: "Ordered her anchorage within outer harbour," and writes: "The authorities have ordered us to anchor in the outer harbour on account of the vessel being liable to sink and therefore blocking the harbour." The ship's agent writes on the Monday: "The authorities fearing the vessel might sink at this berth . . . . ordered her away to the western extremity of the outer harbour, where she is at anchor . . . . in an exposed position; should a gale from the north-west arise the captain fears she may be blown on to the breakwater . . . . as soon as circumstances permit she will be taken to the dry dock." This was obviously not an intentional beaching for safety; but in fact the vessel took the ground forward, being some 17 feet down by the head, at each low tide for four or five hours a tide. This position must have strained any sound ship, still more a ship badly weakened forward by the explosion. It is difficult to believe it was not known this would happen at the first tide; it was certainly foreseen and submitted to at the second and third tides, and was therefore at those tides an intentional, as distinguished from an accidental, grounding. After the third grounding the bulkheads between holds Nos. 1 and 2

and hold No. 2 and the engine-room gave way, and the vessel filled and sank. There was considerable controversy as to the state of the bulkhead aft of hold No. 1, and the consequent amount of water in No. 2 hold, before the groundings. The mate's log and the oral evidence represent the pumps as keeping down this water till on the morning of Tuesday, February 2, there were only 7 inches in the port bilge, 1 foot 7 inches in the starboard, and that the rise of water in No. 2 hold only began after the grounding that afternoon. But the engineer's log tells a very different story. It represents the water in No. 2 as beginning to gain on the pumps from Sunday mid-day, still rising all night, 6 feet on Monday morning, and 12 feet on Tuesday morning as against the 13 inches mean draught of the mate's log at that time. Unfortunately these figures were not put to the other ship's witnesses by the defendants, who only put in the engineer's log at the trial. The explanation may be error in dates, as the engineer's log states he left the ship on the afternoon of February 3, while the experts' report states they kept the tug by the ship on the night of February 3 to take off, if necessary, the chief engineer "who had remained on board." Rowlatt J. found that the bulkhead between Nos. 1 and 2 holds was seriously weakened by the explosion; and in view of the engineer's log I see no ground to dissent from this finding. He found that in good weather, and if allowed to stay at her first berth, the *Ikaria* might have been saved. He found that in fact she sank from her bulkheads, weakened by the explosion, giving way and from the strain of the grounding; or, in other words, from grounding in her damaged condition. He is not satisfied that if a sound ship had grounded in this way in this trim she would have suffered these injuries. I agree with these findings, but I think it also follows, whatever the legal effect may be, that the sinking did not necessarily follow from the explosion; that is to say, that with fine weather, and a stay in the first berth, the ship would have been saved; with the weather she in fact met, and in the berth to which in consequence of that weather she was ordered, she was lost.

What is the legal effect of these facts under the policy? The claim is one for loss under a policy of insurance, and in deciding whether a loss is occasioned by a peril insured against it is the

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long-established rule that the proximate and not the remote cause is to be looked at. Lindley L.J. said in *Reischer* v. *Borwick* (1): "This rule is based on the intention of the parties as expressed in the contract into which they have entered; but the rule must be applied with good sense, so as to give effect to, and not to defeat, those intentions." With great respect to that learned judge, I doubt whether any one unfamiliar with the rule of causa proxima and reading the words of a Lloyd's policy or bill of lading would discover it was "the intention of the parties" to apply it. It is in my view a judge-made rule of construction, which came into existence because it was found that among the infinite variety of causes which contribute to produce any given result not even "good sense" could select with any certainty the real cause of the loss. The underwriters, familiar with the law of their business, know of it; to most assured it comes as a surprise when they inquire as to the legal effect of their policy.

The group of cases decided by the House of Lords in 1887 on the meaning of the words "perils of the sea" contains authoritative statements of this rule. In *The Xantho* (2), where a ship had been sunk by collision, and the Court of Appeal had previously held in *Woodley & Co.* v. *Michell & Co.* (3) that collision caused by negligence of the other ship was not a peril of the sea, the Court of Appeal had held that mere proof of collision did not protect the shipowner under a bill of lading. Lord Esher had said (4) that in a policy only the causa proxima of the loss was to be looked to; under a bill of lading "the real and moving cause of the loss" had to be sought for; and that where the collision was caused by negligence, that, though not the causa proxima, was the real and moving cause of the loss. In *Pandorf & Co.* v. *Hamilton, Fraser & Co.* (5), where a rat ate a bath pipe, whereby salt water entered the hold and damaged goods, the Court of Appeal had held the shipowner was not protected by an exception of perils of the sea in the bill of lading. Lord Esher (6) repeated his statement in *The Xantho* (4) as to the different rules of construction applicable to policies and

(1) [1894] 2 Q. B. 550.
(2) (1886) 11 P. D. 170.
(3) (1883) 11 Q. B. D. 47.
(4) 11 P. D. 172.
(5) (1886) 17 Q. B. D. 670.
(6) 17 Q. B. D. 674.

bills of lading, holding that in the latter the causa causans, the "real effective cause," was looked for; and held that the rats were the cause, the real effective cause, of the damage and the sea was not. The House of Lords (1) reversed both these decisions, pointing out that the rule of causa proxima applied equally to policies and bills of lading with this difference, that there was in the latter, unless excluded by a negligence clause, an implied term against the negligence of the shipowner and his servants. They held that the proximate cause of each loss was the entry of sea water, a peril of the sea, and the fact that the sea water entered through rats or the negligence of others was immaterial, for only the proximate cause was considered. "In the case of a marine policy the causa proxima alone is considered. If that which immediately caused the loss was a peril of the sea, it matters not how it was induced, even if it were by the negligence of those navigating the vessel": Lord Herschell in *The Xantho*. (2) "The ordinary rule of insurance law is that . . . . you are not to trouble yourself with distant causes, or to go into a metaphysical distinction between causes efficient and material and causes final; but you are to look exclusively to the proximate and immediate cause of the loss . . . . the proximate and absolute certain cause of the loss": Willes J. in *Ionides* v. *Universal Marine Insurance Co.* (3) In *The Xantho* Lord Herschell says (4): "I am aware of only one case which throws a doubt upon the proposition that every loss by incursion of the sea, due to a vessel coming accidentally (using that word in its popular sense) into contact with a foreign body, which penetrates it and causes a leak, is a loss by a peril of the sea. I refer to the case of *Cullen* v. *Butler* (5), where a ship having been sunk by another ship firing upon her in mistake for an enemy, the Court inclined to the opinion that this was not a loss by perils of the sea" (they held it was a loss within the general words). "I think, however, this expression of opinion stands alone, and has not been sanctioned by subsequent cases." It was suggested in argument that this passage laid stress on the word "accidentally"; but I think this means, as was held by the Court of Appeal in *The*

(1) 12 App. Cas. 503, 518.
(2) 12 App. Cas. 510.
(3) 14 C. B. (N.S.) 289.
(4) 12 App. Cas. 509.
(5) 5 M. & S. 461.

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Torbryan (1), where reckless use of hooks damaging bags was held "an accident," "a fortuitous and unexpected occurrence" to the injured ship, just as murder has been held an "accident" to the victim under the Workmen's Compensation Act. The expression "accident" is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or untoward event which is not expected or designed: per Lord Macnaghten in *Fenton* v. *Thorley & Co.* (2) Murder was held an accident to the victim by the House of Lords in *Trim Joint District School Board* v. *Kelly*. (3) In *The Xantho* (4) Lord Bramwell said: "Was it by a peril of the sea that the defendants' ship foundered? The facts are, that the sea water flowed into her through a hole, and flowed in such quantities that she sank. It seems to me that the bare statement shows she went to the bottom through a peril of the sea. . . . . The Court of Appeal, with great respect, argued as though the collision caused the loss. So it did in a sense. It was a causa sine qua non, but it was not the causa causans. It was causa remota, but not causa proxima. The causa proxima of the loss was foundering." This strict rule has been applied in all classes of insurance cases. In *Winspear* v. *Accident Insurance Co.* (5) on a policy against personal injury causing death, with a proviso that it should not extend to injury caused by or arising from natural disease, the Court of Appeal held that the death of a man, who was drowned in a stream into which he fell while in an epileptic fit, could be successfully sued for under the policy. This was followed in *Lawrence* v. *Accidental Insurance Co.* (6), where a man was killed on the railway, on which he had fallen in a fit, by a passing train. The judgment in this case of Watkin Williams J., a judge very experienced in insurance law, is worthy of attention, where he points out that the fit was not the "proximate and immediate cause of the death." He also takes the view that once you get a succeeding accident or cause it is immaterial how closely in point of time it follows the first accident or cause; there is a break in the chain of causes. See also the discussion of the question by the Court of Appeal in *In re Etherington and Lancashire and Yorkshire Accident Insurance*

(1) [1903] P. 194, 201.
(2) [1903] A. C. 443, 448.
(3) [1914] A. C. 667.
(4) 12 App. Cas. 513, 514.
(5) (1880) 6 Q. B. D. 42.
(6) (1881) 7 Q. B. D. 216.

Co. (1) In *Taylor* v. *Dunbar* (2), where storms delayed a ship so that her cargo of meat went bad, it was held that it was not a loss by perils of the seas, as they were not the proximate cause of the loss. In *Davidson* v. *Burnand* (3), where an engineer negligently left a valve open so that sea water flowed in and damaged cargo, it was held a loss by perils of the seas, or the general words as the vessel was in harbour, as the negligence was not the proximate cause of the loss. In *Dudgeon* v. *Pembroke* (4), where the vessel was unseaworthy at starting, though, it being a time policy, there was no warranty of seaworthiness, and was then driven ashore by storms, the loss was held by the House of Lords a loss by perils of the sea, Lord Penzance saying (5): "A long course of decisions in the Courts of this country has established that 'causa proxima et non remota spectatur' is the maxim by which these contracts of insurance are to be construed, and that any loss caused immediately by the perils of the sea is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it." In that case, therefore, the shipowner succeeded because the proximate cause of the loss was perils of the sea. He would have failed under a voyage policy with a warranty of seaworthiness, even though the unseaworthiness had nothing to do with the loss, not because perils of the sea were not the proximate cause, but because owing to the breach of the warranty the policy never attached. Other cases and illustrations may be multiplied indefinitely.

It seems, therefore, that had this been a policy against perils of the sea only there would on the facts of this case have been a loss by perils of the sea, the entry of sea water into the vessel, and the underwriters could not have successfully pleaded: "This is not a loss by perils of the sea, but by enemies."

The next step seems to me much more difficult. It is said that this is not a policy against perils of the seas only, but includes a warranty "warranted free from all consequences of hostilities or warlike operations;" and it is said, even if this loss be within the policy as proximately caused by perils of the sea or men-of-war,

(1) [1909] 1 K. B. 591.
(2) (1869) L. R. 4 C. P. 206.
(3) L. R. 4 C. P. 117.
(4) 2 App. Cas. 284.
(5) Ibid. 297.

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it is taken out again by the exceptive warranty because it was the consequence of hostilities. The operation of such a warranty is to take out of the policy a loss which would otherwise be within it. "The warranty is intended to withdraw from the protection of the policy certain of the risks which are prima facie covered by it": per Mathew L.J. in *Robinson Gold Mining Co.* v. *Alliance Insurance Co.* (1) The inartistic character of the warranty in that it uses different language from that of the enumeration of risks has been frequently commented upon, and it has been pointed out that the words "capture, seizure, detention, and the consequences thereof," &c., in the warranty are really equivalent to "men-of-war . . . . enemies . . . . arrests, restrainments and detainments of all kings," &c., in the risks in the policy. It has not hitherto usually been considered that the operation of the f.c.s. clause was to take out of the policy other perils than those of war and the kindred risks; it has not been supposed to affect losses proximately caused by perils of the sea. It has been further pointed out that the warranty should be construed as if it were a re-insurance against the perils named in it; so that to be protected by the warranty a person so re-insured must be able to prove that the perils excepted were the proximate cause of the loss: per Erle C.J. in *Ionides* v. *Universal Marine Insurance Co.* (2) And the words of this very warranty, "consequences of hostilities," were construed in the same case by Willes J. to mean the proximate consequences or effects of hostilities only. "If you cannot presume the exception of loss from a consequence of hostilities to involve all consequences however remote, you are necessarily driven to say that the word 'consequences' is to be dealt with according to the ordinary rule, as meaning proximate consequences only." (3) The bearing of this on the construction of the present policy would seem to be that, as the policy insured against the proximate consequences of the perils of the sea, the assured would recover for these, unless they could also be said to be proximate consequences of hostilities. It was therefore contended by the shipowners that the hostilities were the torpedoing of the ship, that the proximate consequences were a hole in No. 1 hold through which water came,

(1) [1902] 2 K. B. 489, 502. (2) 14 C. B. (N.S.) 285.
(3) 14 C. B. (N.S.) 290.

but that this did not sink the ship, for she remained afloat for three days, and that what sunk her was another hole in the ship, namely, the giving way of the bulkhead and consequent entry of water, and that before this happened other causes came into play, the grounding and the swell in the harbour, so that the second entry of water was not a proximate but a remote consequence of hostilities. To illustrate, it could not be a proximate effect or consequence of hostilities that a man injured by the bursting of a shell was then killed by a passing motor car, because owing to his crippled condition he could not get out of the way fast enough; or, to take the case actually put in the authorities, that a ship crippled in a fight was then owing to her slow progress caught by a storm which she would have escaped had she been sound: see Erle C.J. in *Ionides' Case* (1) and Lord Ellenborough in *Livie* v. *Janson*. (2) Erle C.J. in *Ionides' Case* (1), however, gives further illustrations which render the application difficult to follow. He says: "Suppose there was a hostile attempt to seize the ship, and the master in seeking to escape capture ran ashore and the ship was lost: there the loss would be a loss by the consequences of hostilities within the terms of this exception." He does not say whether the assumed running ashore is intentional, i.e. a general average sacrifice, which would also be a loss by perils insured against—*Dickenson* v. *Jardine* (3)—or accidental. See also *Gordon* v. *Rimmington*. (4) But in *Green* v. *Elmslie* (5) a vessel was driven by a gale "on" (query near) "an enemy's coast" and was there captured, and this was held a loss by capture, not by perils of the sea, not being a proximate consequence of perils of the sea. It is not quite clear, therefore, why in Erle C.J.'s illustration the stranding would be a proximate consequence of hostilities; it might or might not have happened. His second illustration is: "Suppose the ship chased by a cruiser, and, to avoid seizure, she gets into a bay where there is neither harbour nor anchorage, and in consequence of her inability to get out she is driven on shore by the wind and lost; that again would be a loss resulting from an attempt at capture, and would be within the exception." This surely would

(1) 14 C. B. (N.S.) 286.
(2) 12 East, 648.
(3) (1868) L. R. 3 C. P. 639.
(4) (1807) 1 Camp. 123.
(5) (1794) Peake, N. P. 278.

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depend on how long the adverse wind which kept her in the bay held. If it changed, the vessel would get out unharmed, and the suggestion seems contrary to the decision in *Green* v. *Elmslie*. (1) Where loss by perils of the sea follows loss by capture, the first owner recovers for loss by capture: *Andersen* v. *Marten*. (2) As was said by Channell J. in that case (3), "The owner lost his ship by capture. The Japanese captors lost their prize by shipwreck." Where loss by capture is alleged to follow loss by perils of the sea, the question would appear to depend on whether the goods were already lost by perils of the sea. They were treated as already so lost in *Hahn* v. *Corbett* (4), and in the case of the bulk of the cargo in *Ionides' Case* (5), possibly also in *Bondrett* v. *Hentigg*. (6) I notice that in *Powell* v. *Hyde* (7), where a vessel was sunk by cannon shot in the Danube under the mistake that she was an enemy, it was not argued that the loss was by perils of the sea or the general words, but the loss was treated as one by capture and seizure within the warranty.

Great reliance was placed by either side on the cases of *Pink* v. *Fleming* (8) and *Reischer* v. *Borwick* (9), each decisions of the Court of Appeal. In *Pink* v. *Fleming* (8) the goods were warranted "free from particular average . . . . unless damage be consequent on collision with any other ship." To repair damage done to the ship by collision perishable goods had to be discharged, and damage to them was caused partly by handling, partly by delay. Mathew J. and the Court of Appeal treated the damage as too far removed from the collision to be consequent on it. All the members of the Court of Appeal treat the matter as an application of the well-known rule of causa proxima, though, as Lord Esher says, the cause of the damage was the repairs, and the cause of the repairs was the collision. These judgments appear to proceed exactly on the lines of *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (10) In *Reischer* v. *Borwick* (11) the insurance was against "damage received in collision." A collision broke a hole in the condenser; the captain

(1) Peake, N. P. 278.
(2) [1908] A. C. 334.
(3) [1907] 2 K. B. 248, 253.
(4) (1824) 2 Bing. 205.
(5) 14 C. B. (N.S.) 259.
(6) (1816) Holt, N. P. 149.
(7) (1855) 5 E. & B. 607.
(8) 25 Q. B. D. 396.
(9) [1894] 2 Q. B. 548.
(10) 12 App. Cas. 518.
(11) [1894] 2 Q. B. 548, 551.

anchored and plugged the hole. The vessel was then being towed to dock for repairs, when the plug came out, the vessel filled with water, and was run ashore to prevent sinking. This was held "damage received in collision"—words which were apparently treated as equivalent to "damage caused by collision"—and Lindley L.J., in giving judgment, expresses himself thus: "It appears to me, however, that an injury to a ship may fairly be said to cause its loss if, before that injury is or can be repaired, the ship is lost by reason of the existence of that injury—i.e., under circumstances which, but for that injury, would not have affected her safety. . . . . It" (this view) "is consistent with the judgment in *Pink* v. *Fleming* (1), which is more favourable to the appellants than any other authority cited or known to me." I have read this judgment several times, and, while I quite understand it, it seems to me, with great respect to the learned members of that Court, that, if its principles are applied to the facts of *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (2), that case would have been decided differently. The goods there were damaged because of the continuing existence of a hole made by a rat, through which the water came. If the cause of the hole, and not the water that came through the hole, was the proximate cause, the rat was the proximate cause of the damage, but the House of Lords held it was not. It is said that this loss may be caused both by perils of the sea and by rats, and that in an insurance against perils of the sea warranted free from rats the assured would fail. This seems to me to depart from the rule of insurance law that you only look at the proximate cause. I refer again to the opinion of Watkin Williams J. in *Lawrence* v. *Accidental Insurance Co.* (3), where the policy was against personal injury caused by accidental violence, but did not insure in case of death arising from fits. The assured fell on the railway line in a fit, and a train then ran over him. Watkin Williams J. said: "It is essential that it should be made out that the fit was a cause in the sense of being the proximate and immediate cause of the death, before the company are exonerated, and it is not the less so because you can show that another cause intervened and assisted in the causation."

(1) 25 Q. B. D. 396. (2) 12 App. Cas. 518.
(3) 7 Q. B. D. 221.

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It seems to me, apart from authority, there may well be cases where a cause at once produces a state of things the natural result of which is subsequent loss. The Supreme Court of the United States in *The G. R. Booth* (1), cited in Carver on Carriage by Sea, s. 88, note, a case where an explosion occurred in a ship which blew out the ship's side so that water came in and damaged cargo, seem to have treated the entry of water as an inevitable and absolutely necessary result of the explosion, and to have held that the action of such inevitable results does not prevent their cause from being the proximate cause. This would seem to apply to sinking through the entry of water through leaks made by gunfire or collision; but it would also seem to apply to the damage done through the rat hole. The Supreme Court either did not approve of *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (2), or treated the entry of the water not as an inevitable consequence, but one that depended on the weather that the ship met with. The latter view would not be sufficient according to Lindley L.J.'s illustration in *Reischer* v. *Borwick* (3), where he puts the case of a damaged ship, which can float in calm weather, but sinks in her injured condition in a subsequent storm.

The learned judge below decided this case on the authority of *Reischer* v. *Borwick* (4), but he also added some reasoning of his own. He thought it was not necessary that the sinking should inevitably follow from the explosion. "She was not saved after being injured by the torpedo, and when you have said that you have said the whole, in my judgment." I do not understand this. It looks at first sight like the fallacy post hoc ergo propter hoc, which I am sure Rowlatt J. does not mean. To say that if after injury she is not saved it must be the injury that sank her overlooks the case of the intervention of some new and overwhelming disaster as a hurricane or fire. One must add the qualification "and was sunk as the immediate consequence of that injury." For such a

(1) 171 U. S. 450. [The report at large shows that *Hamilton* v. *Pandorf* was relied on and expressly distinguished: "There is nothing in the report of any stage of that case to show that the sea water entered the ship immediately upon the gnawing by the rats of the hole in the pipe": Cur. per Gray J. at p. 462.—F. P.]

(2) 12 App. Cas. 518.

(3) [1894] 2 Q. B. 551.

(4) [1894] 2 Q. B. 548, 551.

proposition there is ample authority in the principles stated in *Reischer* v. *Borwick*. (1) But for that case I should have felt bound by the authorities to hold that there was here a loss by the proximate cause, perils of the sea, and that, as the warranty must also be limited to proximate consequences of hostilities, hostilities here were only a cause, and not the proximate cause, of the loss. And on the best consideration I can give to it, I do not think the principles in the judgment in *Reischer* v. *Borwick* (1) are consistent with the previous authorities I have cited, and particularly with the decision of the House of Lords in *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (2), Lindley L.J. saying (3): "The fact that some fresh cause arises, without which the injury would not have led to further loss, is, ... in such a case far from conclusive." I respectfully think that on the earlier authorities it would have been conclusively treated as the only proximate cause. But *Reischer* v. *Borwick* (1) professed to consider *Pink* v. *Fleming* (4), and Lopes L.J., one of the members of the Court, was the trial judge in *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (2); and I have come to the conclusion that it is my duty as a member of the Court of Appeal to endeavour to follow such a decision of the Court, which its members thought was consistent with previous decisions, and to leave to the House of Lords, if it is thought right to bring the matter before their consideration, the task of explaining, correcting, or approving the decisions of the Court of Appeal.

I appreciate that most plain men and many lawyers not conversant with insurance decisions would say at once that the loss here was a consequence of hostilities; but I am sure they would also say that the immediate cause of the damage to cargo in *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (2) was rats, in which case their judgment, like the Court of Appeal's, has been reversed by the House of Lords. I think they would also say that the cause of death in *Lawrence's Case* (5) was fits, contrary to the decision of the Divisional Court.

For these reasons, after much hesitation, I have come to the

(1) [1894] 2 Q. B. 548.
(2) 12 App. Cas. 518.
(3) [1894] 2 Q. B. 551.
(4) 25 Q. B. D. 396.
(5) 7 Q. B. D. 216.

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conclusion that I am bound by the principles enunciated in *Reischer* v. *Borwick* (1) to affirm the judgment of Rowlatt J. in this case.

Appeal dismissed.

Solicitors for plaintiffs: *Alfred Bright & Sons, for Batesons, Warr & Wimshurst, Liverpool.*

Solicitors for defendants: *William A. Crump & Son.*

W. F. B.

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[IN THE COURT OF APPEAL.]

LONDON COUNTY COUNCIL *v.* GALSWORTHY.

Metropolis—General Line of Buildings—Certificate of Superintending Architect—Order of Tribunal of Appeal—Definition of Building Line—Conclusiveness—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 22, 24, 25, 183.

In 1897 the superintending architect of metropolitan buildings, appointed under the London Building Act, 1894, defined the general line of buildings in a street with reference to a certain plot of land which formed part of a row of premises in the street lying between two side streets. The owner of the land appealed to the tribunal of appeal, which by an order of March 12, 1897, varied the certificate and determined that the building line was in a different position and that it extended beyond one of the side streets. In May, 1912, the superintending architect was called upon to define the building line in the same street with reference to a building in the same row of premises as the plot of land above referred to. No buildings altering the building line had been erected in this part of the street since 1897. The architect issued his certificate, defining the building line to be as defined by the architect's certificate issued in 1897. On appeal to the tribunal of appeal by a person claiming to be aggrieved by the certificate, it was contended that the building line in the part of the street in question had been finally determined by the tribunal's order of March 12, 1897. It was contended for the London County Council that that order was made without jurisdiction in that it purported to define the building line in a part of the street which had not been dealt with by the architect's certificate, and evidence was tendered by the Council to prove that the building line was as defined by the architect's certificates issued in 1897 and 1912. The tribunal

(1) [1894] 2 Q. B. 548.

rejected the evidence and made an order reversing the certificate of May, 1912 :—

Held by the Court of Appeal, affirming the decision of the Divisional Court (ante, p. 85), that the order of the tribunal of appeal of March 12, 1897, was made within the jurisdiction of the tribunal, that the building line was finally and conclusively defined by that order, and that the evidence tendered had been rightly rejected.

In re London County Council (1904) 91 L. T. 501 approved.

APPEAL from the decision of a Divisional Court (Viscount Reading C.J. and Ridley and Low JJ.) (1) upon a case stated by the tribunal of appeal under the London Building Act, 1894, at the request of the London County Council on certain questions of law involved in an appeal to the tribunal under s. 25 of the said Act against a certificate of the superintending architect of metropolitan buildings dated May 31, 1912.

The Divisional Court held that the order of the tribunal of appeal of March 12, 1897, was made within the jurisdiction of the tribunal, that the building line was finally and conclusively defined by that order, and that the evidence tendered had been rightly rejected.

The London County Council appealed.

Upjohn, K.C., and *Craig Henderson*, for the appellants, repeated the arguments used by them in the Divisional Court, and in addition referred to the following authorities :—*Fleming* v. *London County Council* (2), *London County Council* v. *Clode* (3), *Bauman* v. *Vestry of St. Pancras* (4), *Wandsworth Board of Works* v. *Hall* (5), and *Duke of Buccleuch* v. *Metropolitan Board of Works.* (6) Upon the point that the evidence ought to have been admitted to show that the inferior tribunal had exceeded its jurisdiction in making the order of March 12, 1897, they referred to *Fisher* v. *Pimbley* (7), *Read* v. *Pope* (8), and *Briscoe* v. *Stephens.* (9)

E. M. Pollock, K.C., and *Herbert Smith*, for the respondent, were not called upon to argue.

(1) Ante, p. 85, where the facts and the questions submitted are stated in full.
(2) [1911] A. C. 1.
(3) [1915] A. C. 947.
(4) (1867) L. R. 2 Q. B. 528.
(5) (1868) L. R. 4 C. P. 85.
(6) (1870) L. R. 5 Ex. 221.
(7) (1809) 11 East, 188.
(8) (1834) 1 C. M. & R. 302.
(9) (1824) 2 Bing. 213, 219.

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LORD COZENS-HARDY M.R. The decision of the Divisional Court was, in my opinion, perfectly correct.

The question arises in this way: the property is in the Euston Road, and it is in that portion of the road which lies between Fitzroy Street and Southampton Street on the south side of the road. The Euston Road is of very considerable length. It varies in width, and certainly is not a road in which there is a mathematically straight line which may be taken as the building line. In the year 1897 Sir Horace Regnart, who owned a plot of land at the Southampton Street end of what I call "the block" without prejudice, was desirous to build, and applied, in pursuance of the London Building Act, 1894, s. 22, requesting that a building line should be defined. The section says: "Such general line of buildings shall if required be defined by the superintending architect by a certificate, such certificate to be issued" within a certain time. Now I agree with Mr. Upjohn's argument, both upon and apart from the authorities, that it is not for the architect to define what he thinks will be the best building line most convenient for the public or for the neighbourhood; he is to see what is the general building line of a particular street, because that general building line—which may be, and, speaking generally, must be, created by acts done during a considerable number of years by other people—will, under the policy of the Act of 1894, affect the building rights of anybody else within the limits of its definition. The architect was requested in 1897 to define a building line at this part of the Euston Road. He was not requested to define the building line within the block of houses bounded on one side by Fitzroy Street and on the other side by Southampton Street, and he was not requested to define the building line for the whole of the Euston Road, which is of very considerable length; he was asked to define it in this part where Sir Horace Regnart's property was. He did define a building line, taking the limits of the block from Fitzroy Street on the one side to Southampton Street on the other. There was an appeal to the tribunal, the statutory body authorized to review the decision of the superintending architect, to find as a fact what was the general building line at this particular part of the Euston Road. The appeal tribunal took the view that this small section between Fitzroy Street and Southampton Street was too short to enable the

general building line to be defined by mere reference to that distance, and they took a longer view: they took the space down to Tottenham Court Road, and they defined a building line for the whole of that distance. The County Council were present at those proceedings, and the view which they took then was not adopted. Twenty years have now gone by since that inquiry was entered into, and the only point for our decision is this: Is there any obligation on the architect to define the line only within the limits of a particular block, or is he entitled to look at the position and the lines of the street and houses and all the other circumstances which may lead him as an expert to conclude that in fact a general building line can only be ascertained by going beyond the particular block? In my opinion there is no foundation for saying that the construction of the Act of Parliament for which the appellant's counsel contend is the true view. Sect. 22, sub-s. 1, says "No building or structure shall without the consent in writing of the Council be erected beyond the general line of buildings in any street or part of a street place or row of houses in which the same is situate in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet notwithstanding there being gardens or vacant spaces between the line of buildings and the highway." Now it contemplates that there may be a street with no building on it, or that there may be a street in which there are houses with forecourts or other buildings—there may be few or many houses upon it. In all those circumstances a general building line may have to be defined, and there is nothing whatever, in my view, to justify the contention that the architect exceeds his jurisdiction if he defines a general building line extending beyond the block or having regard to property outside the block. The section then goes on to say "Such general line of buildings shall if required be defined by the superintending architect by a certificate." I do not propose to refer in detail to the sections which give the appellate tribunal jurisdiction. It is quite clear that the appellate tribunal—the tribunal of appeal, as it is called—have the same jurisdiction as the superintending architect, and they are expressly empowered by s. 183 "to confirm or reverse or vary any decision and make any such order as they may think fit." Then it is

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said that although you do not find any reference to a block or row of houses in s. 22 you do find it in s. 24. I will read it: "The superintending architect shall within fourteen days after the issue of the certificate defining the general line of buildings in any street or part of a street place or row of houses cause a notice of his certificate to be served on the local authority": it is quite obvious that the local authority may be interested, not merely in the property in immediate contiguity to the applicant's house or proposed house, but also in adjacent property, and the local authority has to have notice so that there may not be any kind of arrangement made which might be prejudicial to the neighbours. Then the section goes on to say that the superintending architect shall "cause a notice of his certificate to be served on the local authority and on the owner of the houses in the same block or row within a distance not exceeding fifty yards on either side of the building or land to which the certificate relates or where there is no such block or row upon the owner of the adjoining land on either side of the building or land to which the certificate relates." The latter part of the section seems to me to refer to vacant land. The first part refers to property where there is a row or block of houses adjoining, and if there is a block or a row of houses notice must be given to persons fifty yards on either side of the building, but if it is vacant land, then notice is only to be given to the owner—not even to the occupier—of the adjoining land on either side. But it is said that this section, using the words "block or row" and defining the persons within fifty yards who are to have notice, shows that you cannot go outside the row or block. I entirely decline to accept that. Sect. 22 imposes no such limitation, and in the provision in s. 24 Parliament seems to me to have taken a view which was quite reasonable and in accordance with common sense—namely, if there are houses on each side in a row or block of houses, give notice to everybody fifty yards on either side, but if there are none, give notice to the adjoining owner on each side, and in addition give notice to the local authority. With these precautions I think the interests of all persons likely to be aggrieved will be protected; but, whether a person has had notice or not, I feel no doubt that under s. 25 any person deeming himself aggrieved by the certificate, whether he has had notice under s. 24 or not, has a right to appeal to the tribunal of

appeal, and it is irrelevant to say that he was not a person who had notice under s. 24. If that view of ss. 22 and 24 is right, it seems to me there is nothing in this appeal. It is a question of fact to ascertain what is the general building line at a particular block. It is a question of fact on which the view of the architect is not conclusive, and it may be decided differently by the tribunal of appeal, but in every case it is a question of fact, and, being a question of fact, is not open to further appeal.

Then it is said that the tribunal of appeal have exceeded their jurisdiction by finding, contrary to the fact, a line going beyond the block from which they ought not to have departed; counsel for the appellants say they ought to have found that there was a separate building line as to this particular block between Fitzroy Street and Southampton Street. I do not think there has been any excess of jurisdiction in this case.

The view which I venture to take upon this point seems to me the only one consistent with the views expressed in the House of Lords. In *Spackman* v. *Plumstead Board of Works* (1) Lord Selborne says this: "The architect has practically treated the row of continuous or nearly continuous buildings as all that he ought to consider for this purpose. The magistrate has been led to extend his consideration much further right and left; but why he should do so, and then stop at the particular points at which he does stop, does not very clearly appear, certainly not, I think, from anything which is already determined in rerum natura. So that, as to the extent of the space along which a line is to be laid down there is a necessity here for some exercise of judgment. With regard to the line itself within that space, if there is a row of houses along the whole of that space built in a regular mathematical line as to which each person can have no doubt, the fact is already determined, and there is no further room for judgment. But if the buildings within that space are irregular, if one house projects beyond another, or one block of houses projects beyond others, or if there is anything breaking the line, then in the nature of the case there is need of some judgment. And what better judgment than that of the architect of the board, an expert in matters of this description, can be conceived?" But Lord Herschell is said to have taken a different view in *Barlow* v.

(1) (1885) 10 App. Cas. 229, 243.

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Vestry of St. Mary Abbotts, Kensington. (1) I read that in an entirely different sense. Referring to *Spackman* v. *Plumstead Board of Works* (2) his Lordship says: "In that case it was manifestly considered by their Lordships, and I think rightly, that a building may be situate in a row of houses and bound to conform to the general building line of such row of houses, though that is not the general building line of the street, and further, that the general building line may differ in different parts of the same street, and that it is for the superintending architect to determine"—and these are the words—"'the extent of the space along which a line is to be laid down' in deciding what is the general line of buildings at any part of the street." That seems to me really to show conclusively that it is not a finding of fact to confer jurisdiction, but it is a mere exercise of the jurisdiction in doing that which they are told to do, that is, to find as a fact, not with reference to the limits of a particular block, but with reference to part of a street, what is the general building line in that part of the street in which the property in question is situate. I purposely have not thus far referred to the mode in which this question arises. Nearly twenty years after the 1897 certificate defining the building line the County Council have been minded to ask for a definition of the general building line in this part of the Euston Road. It came before the architect, who gave an award such as the County Council desired to have. It then went to the tribunal of appeal, and they, when their attention was called to their award of 1897, took the view: "We cannot go into this; this was decided by our predecessors nearly twenty years ago, and we cannot hear evidence, because it is a matter which has been decided by the competent tribunal in the presence, moreover,"—although that is not possibly a very material matter—"of the County Council itself." They declined to go into that, and they then, as requested, stated a case for the opinion of the Divisional Court. It came before the Divisional Court, consisting of the Lord Chief Justice, Ridley J., and Low J., and they held that the tribunal were quite right in their view, but that there was no question of law as to which an appeal could lie, and they answered the question in the case on that footing. They went further, and said that on what I may call the block or

(1) (1886) 11 App. Cas. 257, 263. (2) 10 App. Cas. 229, 243.

row point they agreed with the decision of the Divisional Court, consisting of Wills J. and Kennedy J., in *In re London County Council* (1), who plainly adopted that view. There the architect had defined a building line for not one block, but two blocks. The tribunal of appeal prolonged the line very greatly, and took in several more blocks and made the building line along this part of the Fulham Road extend much further. The Divisional Court held that that was quite within the jurisdiction of the tribunal, and that they had power to do it; they might have taken a different view, but it was quite competent for them to say, as a matter of fact: "This, which is a matter of opinion to be formed by experts, in our opinion is a place where the building line ought to be calculated on a longer length, and we therefore do not approve of this shorter building line defined by the architect; we define a longer one." Thinking as I do that that decision was perfectly right, guarding myself against adopting every word of the judgment of Wills J., and thinking the decision of the Divisional Court in this case perfectly right, I think this appeal must be dismissed with costs.

WARRINGTON L.J.: I am of the same opinion.

It is said that as a matter of law, upon the true construction of s. 22 and the other relevant sections of the London Building Act, 1894, if the house or piece of land as to which the question arises is situate in a block or row of houses separate and apart from the street in which that row is, then the tribunal of appeal is bound to settle a separate building line for that block or row. In my judgment there is no ground for any such contention in the relevant sections of the Act of Parliament. Sect. 22, which is the section giving the power to the superintending architect, which power is in the case of an appeal exercisable by the tribunal of appeal, is, so far as is material, in these terms: [The Lord Justice read the section and continued:] The superintending architect is not to say what he thinks ought to be the general line; that is not his function. What he has to say is what is the general line of buildings. There is nothing in that section which requires the architect to confine himself to any particular part of the street or any

(1) 91 L. T. 501.

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particular row of houses in the street. The argument for the County Council is founded upon an expression which is found in s. 24, which contains these words: "the superintending architect shall within fourteen days after the issue of the certificate defining the general line of buildings in any street or part of a street place or row of houses cause a notice of his certificate to be served on"—omitting immaterial words—"the owner of the houses in the same block or row." It is said that there "block" is identified with "row," or, rather, to be more accurate, "row" is identified with "block," indicating that when "row" is used in the other part of the section it is again to be read as identical with "block." In my opinion no such effect can be given to the use of the word "block" in s. 24. The house may be in a block, that is to say, between two cross streets; it may be in a row, which may be intersected by any number of cross streets. If it is in a block, then the owners of the houses in the same block are to be served within the distance of fifty yards, but if it is in a row, then the owner of the houses in the row is to be served within a like distance. I can see no ground whatever, as a matter of construction, for defining "row" as equivalent to "block" by the use of the word "block" in s. 24. The conclusion, therefore, that I come to is that there is no ground for saying that as a matter of law the tribunal of appeal in 1897 were bound to take that block between Southampton Street and Fitzroy Street and say "It is as to that and that alone that we have to settle the building line," or, rather, to say that there is a separate building line for that particular block taken by itself. The question, in my opinion, was a question of fact left to the decision of the tribunal of appeal. They did decide it. There is no ground for saying that there was no evidence before them which would justify that decision, and they did decide by saying that the building line was one extending from Southampton Street to Tottenham Court Road, and that there was not a separate building line from Southampton Street to Fitzroy Street. That was a decision at which it was competent for them to arrive as a matter of fact. It was not a decision preliminary to their adjudication; they were giving a decision of fact on a matter arising within their jurisdiction, and, there not being any ground for disturbing that finding of fact, there is not, in my opinion, any ground for saying that their order was not valid and binding on the present

tribunal of appeal. For these reasons I think the appeal ought to be dismissed.

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SCRUTTON L.J. I agree.

Solicitor for appellants: *Edward Tanner.*
Solicitor for respondent: *E. H. Galsworthy.*

G. A. S.

COLE *v.* DE TRAFFORD AND WIFE.

1917 *March* 8.

County Court—Practice—Excessive Damages—New Trial—Appeal—Husband and Wife—Master and Servant—Employment by Wife—Dangerous Premises—Tort arising out of Contract—Liability of Husband.

No appeal lies from the decision of a county court judge granting a new trial on the ground that the damages awarded by a jury were excessive, if it appears that the judge applied the right rule of law in considering whether a new trial should be granted.

How v. *London and North Western Ry. Co.* [1892] 1 Q. B. 391 applied.

A chauffeur employed by a married woman in and about her garage was injured in the course of his employment through the defective condition of the garage. He brought an action against the married woman and her husband for an alleged tort committed by the former:—

Held, that the tort (if any) arose out of the contract of employment and that the husband was not liable.

Liverpool Adelphi Loan Association v. *Fairhurst* (1854) 9 Ex. 422 and *Earle* v. *Kingscote* [1900] 2 Ch. 585 followed.

APPEAL from the Bloomsbury County Court.

The plaintiff was engaged by Lady de Trafford, one of the defendants, as a chauffeur to drive a motor car owned by Lady de Trafford and to attend to a garage hired by her. Above the doors of the garage was a heavy piece of glass insecurely fixed. On May 31, 1916, when the plaintiff in the course of his duties was opening the doors of the garage, the glass fell from its fastenings and cut his hand.

The plaintiff brought an action in the county court against Sir Humphrey de Trafford and Lady de Trafford his wife claiming damages for personal injuries sustained by him through the

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negligence of the defendants in not discovering or remedying the dangerous condition of the garage.

The case was heard on November 23, 1916, before Judge Bray and a jury.

The result of the trial appears from the following note of the learned judge:—"I held there was no case against Sir H. de Trafford, and he was dismissed from the action. As against Lady de Trafford the jury answered certain questions in favour of the plaintiff and assessed the damages at 100*l.* For Lady de Trafford it was said that the damages were excessive and there ought to be a new trial; it was also said that if necessary it would be contended that there was no case to go to the jury and judgment should be given for her. This point was not argued and I expressed no opinion upon it, as I held that the damages were altogether excessive and such as no reasonable men could properly give taking the most favourable view of the evidence for the plaintiff, and I ordered a new trial, the parties having, I regret, failed to come to any settlement which I suggested. The plaintiff was paid his wages up to August 4. He was still living rent free over the garage. Dr. Toogood, called for him, said he would be entirely recovered in three or four weeks; that when he saw him on November 20 he was then fit to drive and do light duties. He made no attempt to get work. Allowing him full wages up to December 20 would be 40*l.* on the assumption that he earned nothing before that date. That would leave 60*l.* for pain and suffering and inconvenience, which would be a preposterous sum to give in this case."

The plaintiff appealed.

Haldin, K.C., and *C. T. Williams*, for the plaintiff. An appeal lies from the decision of a county court judge that a verdict is against the weight of the evidence. The question is one of mixed law and fact. A judge cannot, in the words of Lord Atkinson in *Herbert* v. *Samuel Fox & Co.* (1), by finding in the words of a statute or rule "endeavour to secure for a finding on a pure question of law, or on a mixed question of law and fact, that unassailability which properly belongs only to a finding on a question of pure fact." The verdict against Lady de Trafford ought to stand.

(1) [1916] 1 A. C. 405, 413.

As to the action against Sir H. de Trafford, a husband remains liable for the torts of his wife as he was at common law before the Married Women's Property Act, 1882: *Seroka* v. *Kattenburg* (1); *Earle* v. *Kingscote* (2); *Beaumont* v. *Kaye*. (3) In the present case the wife has committed a breach of her duty as an invitor within the principle of *Indermaur* v. *Dames*. (4) The husband is therefore liable jointly with her.

du Parcq, for Lady de Trafford. The county court judge has applied the right rule of law in considering the question whether the verdict was excessive. When that has been done the question becomes one of fact and no appeal lies from the decision: *How* v. *London and North Western Ry. Co.* (5)

A. E. Woodgate, for Sir H. de Trafford. At common law no action in tort lay against a married woman or her husband where the tort involved a contract, because a married woman could not contract: *Liverpool Adelphi Loan Association* v. *Fairhurst* (6); *Earle* v. *Kingscote*. (2) Here the alleged tort arises out of the contract of employment. Therefore Sir H. de Trafford was rightly dismissed from the action.

C. T. Williams in reply.

BRAY J. Two questions are raised in this case. First, under what circumstances an appeal will lie from an order of a county court judge granting a new trial on the ground of excessive damages. In my opinion that question is in principle answered by *How* v. *London and North Western Ry. Co.* (5), which decided that no appeal lies from the decision of a county court judge granting a new trial on the ground that the verdict was against the weight of the evidence if it appears that the judge applied the right rule of law in considering whether the new trial should be granted. It is true that the ground of the new trial in that case was that the verdict was against the weight of the evidence, but there is no difference in principle where the verdict is against the weight of the evidence and where it is for excessive damages. The question whether a verdict is

(1) (1886) 17 Q. B. D. 177.
(2) [1900] 2 Ch. 585.
(3) [1904] 1 K. B. 292.
(4) (1866) L. R. 1 C. P. 274; (1867) L. R. 2 C. P. 311.
(5) [1892] 1 Q. B. 391.
(6) 9 Ex. 422.

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against the weight of the evidence is matter of fact. In the words of Lord Esher (1), "Where a county court judge applies the right rule of law in considering whether or not a verdict is against the weight of the evidence, and comes to a conclusion having applied that rule of law to the facts of the case, neither the Divisional Court nor this Court can interfere with his decision. The question then becomes one of fact only, and no appeal lies from his decision on the facts." In the present case the county court judge applied the right rule of law and came to the conclusion that the verdict was such as no reasonable men could properly give. That is a matter of fact, and no appeal lies to this Court upon matters of fact. The plaintiff sought to escape *How* v. *London and North Western Ry. Co.* (2) by means of a dictum of Lord Atkinson in *Herbert* v. *Samuel Fox & Co.* (3) to the effect that "it is wholly illegitimate" for an arbitrator under the Workmen's Compensation Act, 1906, "by finding in the words of the statute to endeavour to secure for a finding on a pure question of law, or on a mixed question of law and fact, that unassailability which properly belongs only to a finding on a question of pure fact." But that dictum contains nothing in conflict with *How* v. *London and North Western Ry. Co.* (2), a decision which binds us. Therefore this first point fails.

Then as to the liability of the husband. It was said that here was a tort and that the Married Women's Property Acts do not exempt a husband from his liability at common law for his wife's torts. That matter was considered in *Earle* v. *Kingscote* (4), where the principle was laid down by Collins L.J. in these words (5): "The general rule of law appears to be clear and unquestioned—that a husband is liable for his wife's fraud as well as for other torts committed by her during the coverture; I need not deal with antecedent torts. That being so, a qualification was put on that rule so far as regarded fraud or other torts embraced in contracts. It was said that where you cannot separate the fraud or other tort in respect of which you are suing from the contract, you cannot, by framing your statement of claim in the shape of tort, turn that which is essentially in its main features contract into tort so as to

(1) [1892] 1 Q. B. 392.
(2) [1892] 1 Q. B. 391.
(3) [1916] 1 A. C. 405, 413.
(4) [1900] 2 Ch. 585.
(5) [1900] 2 Ch. 591.

let in the liability of the husband where the two are inextricably mixed together. You can only treat it in point of law as a contract, and not as a tort. You cannot let in the liability of the husband by turning that which is essentially contract into tort in the mode stated." Further on the Lord Justice said (1): "A contract had been unquestionably made between these two ladies. That contract embraced certain obligations on the one side and on the other, and existed entirely independently of the fraud. The fraud had nothing to do with inducing the parties to enter into the contract. Then came the performance of the obligation; and at that stage, when on the happening of a certain event an obligation would fall on one of the parties, the defendant, Mrs. Kingscote, by a false and fraudulent representation that the event had happened, made it appear that the time at which under the contract the plaintiff was to pay the money had arrived. All that the contract afforded in this case was a convenient opportunity to the defendant to commit a fraud if she were so minded: it had no other relation to the fraud." In the present case the cause of action is for a breach of duty arising out of a contract. It is said that the duty arose out of an invitation to enter the garage; but there was no invitation except under the contract of employment. In order to prove the invitation it was necessary to prove a contract. The duty which arose from the invitation commenced with and continued throughout the employment of the plaintiff, and was merely part and parcel of that transaction. Therefore this tort was based upon contract and the husband is free from liability. The appeal therefore fails on both points and must be dismissed.

HORRIDGE J. I am of the same opinion. It is not for this Court to say whether the decision of the Court of Appeal in *How* v. *London and North Western Ry. Co.* (2) is right or wrong. It is binding on us. It follows from that decision that when a county court judge has directed himself rightly the question whether a verdict is excessive or not is a pure question of fact.

The second point is of more interest. The action is founded on the relation of master and servant. That relation depends upon the contract between the plaintiff and Lady de Trafford. The cause

(1) [1900] 2 Ch. 593. (2) [1892] 1 Q. B. 391.

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of action was a breach of duty arising out of that contract. Can a husband be made liable for his wife's breach of a duty arising out of her contract? That question is answered by *Liverpool Adelphi Loan Association* v. *Fairhurst* (1) and *Earle* v. *Kingscote*. (2) In the first case it was sought to charge a husband with damages for the fraud of his wife, namely, a misrepresentation inducing a contract. The law is laid down clearly by Alderson B. in the course of the argument. (3) "It seems to me," said that learned judge, "that the torts of the wife, for which the husband is to be considered as responsible, are those only which are purely torts, that is to say, such as are in no way connected with a contract." How can it be said that the tort in the present case is in no way connected with a contract? The contract of employment is the foundation of the action. In the second case Collins L.J. said (4): "The general rule of law appears to be clear and unquestioned—that a husband is liable for his wife's fraud as well as for other torts committed by her during the coverture; I need not deal with antecedent torts. That being so, a qualification was put on that rule so far as regarded fraud or other torts embraced in contracts. It was said that where you cannot separate the fraud or other tort in respect of which you are suing from the contract, you cannot, by framing your statement of claim in the shape of tort, turn that which is essentially in its main features contract into tort so as to let in the liability of the husband where the two are inextricably mixed together." Here it is impossible to separate the tort from the contract of employment. The tort arises out of that contract and is inextricably connected with it. Therefore the husband is not liable and the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Berry, Tompkins & Co.*
Solicitors for Sir H. de Trafford: *Burch, Whitehead & Davidsons.*
Solicitors for Lady de Trafford: *Eardley Holt, Lightly & Slater.*

(1) 9 Ex. 422.
(2) [1900] 2 Ch. 585.
(3) 9 Ex. 427.
(4) [1900] 2 Ch. 591.

W. H. G.

BRIGHT *v.* ROGERS.

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March 8.

County Court—Practice—Notice of Statutory Defence—Set-off—Claim for Price of Goods Sold—Breach of Warranty—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 53—*County Court Rules*, 1903 *and* 1914, *Order x., rr.* 10, 18, 21.

To a claim for the price of goods sold the defence of a breach of warranty is not a set-off within Order x., r. 10, of the County Court Rules, 1903 and 1914; nor has it by the passing of the Sale of Goods Act, 1893, become a statutory defence within r. 18 of that order; therefore notice of such a defence need not be given under the order.

Semble, a statutory defence is one which has its origin only in a statute.

Appeal from the county court of Gloucestershire holden at Stow-on-the-Wold.

On August 8, 1916, the plaintiff issued a summons in the county court claiming 8*l.* 10*s.* 6*d.* for thirty-seven weeks' keep of a mare at 2*s.* 6*d.* a week and thirteen weeks' keep at 6*s.* a week. The defendant counterclaimed 56*l.*, the price of the mare.

The case came on for hearing before Judge Ellicott and a jury. The plaintiff gave evidence of the following facts:—On May 31, 1915, he had bought the mare from the defendant with a warranty that she was sound. In fact she was lame. On June 28 the defendant offered to take her back if she did not improve. On August 2 the plaintiff returned the mare, but the defendant refused to take her back and requested the plaintiff to keep her for a few weeks, promising to pay for her keep. Subsequently the plaintiff again offered to return the mare, and the defendant again refused to take her back.

Counsel for the defendant contended that the alleged breach of warranty could not be set up as a defence to the counterclaim, inasmuch as it was a statutory defence since the passing of the Sale of Goods Act, 1893, and no notice of it had been given as required by Order x. of the County Court Rules, 1903 and 1914. (1)

(1) County Court Rules, 1903 and 1914, Order x., r. 10: "Where a defendant intends to rely on any of the grounds of defence mentioned in rules 12, 13, 14, 15, 16, 17, 18, 19, and 20 of this order, or

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The county court judge made the following note of his decision :— "I offered to adjourn the case to enable the plaintiff to set up the statutory defence on the usual terms as to costs. The learned counsel for the plaintiff elected to leave the case where it was. I held that the statutory defence must be set up in accordance with the rules, and that, that not having been done nor an adjournment accepted, there was no defence to the counterclaim. And as to the claim I held (after hearing arguments) that there was no fresh consideration to support the fresh agreement to take back the mare, and therefore no cause of action in respect of the keep. I withdrew the case from the jury and gave judgment for the defendant on claim and counterclaim."

The plaintiff appealed.

A. F. Clements, for the appellant. In answer to a claim for the price of goods sold evidence of a breach of warranty might be given at common law under the general issue : *Street* v. *Blay* (1) ; *Mondel* v. *Steel* (2) ; *Davis* v. *Hedges*. (3) A statutory defence is one which would not exist but for some statute : *Conroy* v. *Peacock* (4) ; *Brutton* v. *Branson*. (5) If a breach of warranty is proved, there is ample consideration for the defendant's promise to pay for the keep of the mare.

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upon any set-off or counterclaim, he shall file in duplicate a notice stating thereon his name and address, together with a concise statement of his grounds of defence, or of his set-off or counterclaim, five clear days at least before the return day; . . . . Provided that in case of non-compliance with this and the above mentioned rules, and of the plaintiff's not consenting at the trial to permit the defendant to avail himself of such defence, set-off, or counterclaim, the judge may, on such terms as he may think fit, adjourn the trial of the action to enable the defendant to give such notice."

Rule 18 : "When in any action the defendant relies on any statutory defence, or on any defence of which he is required by the Act or any statute to give notice, he shall in his statement . . . . set forth the year, chapter, and section of the statute, or the short title thereof, and the particular matter on which he relies, or otherwise sufficiently indicate the nature of the defence on which he relies."

By r. 21 the foregoing rules are made applicable to an answer to a counterclaim.

(1) (1831) 2 B. & Ad. 456.
(2) (1841) 8 M. & W. 858.
(3) (1871) L. R. 6 Q. B. 687.
(4) [1897] 2 Q. B. 6.
(5) [1898] 2 Q. B. 219, 222.

Lort Williams, for the respondent. A defence may be a statutory defence although it was raised under the general issue before the Judicature Acts; but, even if that were not so, a judgment of a county court judge may upon appeal be upheld on grounds other than those on which it purports to rest: *Chapman* v. *Knight*. (1) If a breach of warranty is not a statutory defence within r. 18 it is matter of set-off within r. 10 of Order x.: Halsbury's Laws of England, vol. 25, s. 850. It was only allowed to be set up in reduction of damages in order to avoid circuity of action: *Street* v. *Blay*. (2) If it is a set-off or counterclaim it is still necessary to give notice of it. There is a difference where the claim is for a specific sum and where it is upon a quantum meruit. In the former case the claimant may have some ground to complain of surprise if evidence is admitted to show that the subject-matter of the contract is not worth the contract price: *Basten* v. *Butter*. (3) [*Willis* v. *Lovick* (4) and *Lewis* v. *Burrell* (5) were also cited.]

Counsel was not called upon to reply.

BRAY J. The first question is whether this alleged breach of warranty is a statutory defence. The suggestion is that every defence which would be warranted by the Sale of Goods Act, 1893, is a statutory defence within the meaning of Order x., r. 18, of the County Court Rules. If the suggestion is well founded the effect would be very far reaching. In the same way any defence which might be set up under the Bills of Exchange Act, 1882, would equally be a statutory defence within that rule. Before the Sale of Goods Act, 1893, was passed it was the law that a defendant when sued for the price of goods might without any special plea set up a warranty and breach of the warranty in diminution of the price. *Street* v. *Blay* (2) is a clear authority on that. In *Davis* v. *Hedges* (6) Hannen J. quotes the judgment of Parke B. in *Mondel* v. *Steel* (7) in these words: "In all these cases of goods sold and delivered with a warranty, and work and labour, as well as the case of goods agreed to be supplied according to a contract, the

(1) (1880) 5 C. P. D. 308.
(2) 2 B. & Ad. 456.
(3) (1806) 7 East, 479.
(4) [1901] 2 K. B. 195.
(5) (1898) 77 L. T. 626.
(6) L. R. 6 Q. B. 687, 689.
(7) 8 M. & W. 858, 871.

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rule which has been found so convenient is established; and, it is competent for the defendant, in all of those, not to set off, by a proceeding in the nature of a cross action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject matter of the action was worth, by reason of the breach of contract." Notwithstanding that, it is said that since the Sale of Goods Act, 1893, a breach of warranty must now be pleaded as a statutory defence. This matter came to be considered in *Brutton* v. *Branson*. (1) The question there was whether s. 17 of the Statute of Frauds as re-enacted by s. 4 of the Sale of Goods Act, 1893, was a statutory defence within the meaning of Order x., r. 18. Wills J. there said: "The words 'statutory defence' are not words of art. It seems to me to be plain that r. 18 (*a*)"—now r. 18—"was intended to apply to actions of contract. It has been contended that even if it does, still it does not cover the Statute of Frauds, on the ground that the non-existence of a writing to satisfy that statute is not matter of defence. I cannot agree. It has always been treated by lawyers as a matter of defence. Then, if it is a defence, it is a statutory defence, for the defence is one which has its origin only in a statute." That certainly cannot be said of the defence of a breach of warranty.

Then it was said that this defence was really a set-off and that under Order x., r. 10, of the County Court Rules a set-off must be specially pleaded. In my opinion it is clearly not a set-off. It was held for many years that it was matter which could be raised on the general issue. No statute has ever directed that it shall be pleaded as a set-off. The next contention was that it was in the nature of a set-off and that such evidence as was tendered and admitted at the trial might be, and in this case was, a surprise to the defendant. But there is no rule in the county court which makes it necessary to raise by special defence matter which may surprise the defendant. The only special defences are those specified in rr. 10 to 20 of Order x. The defendant in effect asks us to introduce into the county court procedure Order xix., r. 15, of the Rules of the Supreme Court, to the effect that the plaintiff or defendant must raise by his pleading all such grounds of defence or reply as, if not

(1) [1898] 2 Q. B. 219, 222.

raised, would be likely to take the opposite party by surprise. The County Court Rules contain no such provision. Although we have listened to the argument that the defence of a breach of warranty is equivalent to a set-off, and decide against that contention, we are not to be taken to regard it as properly raised in this case. In my view the county court judge came to a wrong conclusion, and there must be a new trial.

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HORRIDGE J. I agree. The defence raised was neither a statutory defence nor a set-off. Even if it had been a set-off, I have doubts whether, having regard to the grounds on which the county court judge decided the case, it would have been open to us to have supported his judgment on the ground that notice of the set-off ought to have been given. This is a very different case from *Chapman* v. *Knight*. (1) We have, however, dealt with the contention as to set-off as if it were properly raised, and decide against it.

Appeal allowed.

Solicitors for appellant: *Helder, Roberts & Co., for F. Treasure, Gloucester.*

Solicitors for respondent: *Smiles & Co., for Steel, Millard & Broom, Cheltenham.*

(1) 5 C. P. D. 308.

W. H. G.

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Feb. 28;
March 16.

[IN THE COURT OF APPEAL.]

THE KING *v.* SECRETARY OF STATE FOR HOME AFFAIRS. *Ex parte* DUKE OF CHATEAU THIERRY.

Alien—Deportation—Power of Secretary to choose Country to which Alien shall be deported—Aliens Restriction Act, 1914 (4 & 5 *Geo.* 5, *c.* 12), *s.* 1, *sub-s.* 1—*Aliens Restriction* (*Consolidation*) *Order*, 1916, *art.* 12.

The provisions of s. 1, sub-s. 1, of the Aliens Restriction Act, 1914, and of the Aliens Restriction (Consolidation) Order, 1916, made thereunder, do not give a Secretary of State power to order the deportation of an alien to any particular country.

Those provisions, however, empower a Secretary of State, upon making a deportation order, to cause the alien to be detained and placed on board a ship which the Secretary of State selects, and there detained until the ship finally leaves the United Kingdom, with the result that the alien may be obliged to disembark at the port to which the ship sails.

The jurisdiction of the Secretary of State to make a deportation order under the above-mentioned Act and Order is not affected by the fact that the alien is a political refugee, though that fact may properly be taken into account by the Secretary of State in considering whether in the exercise of his discretion he will make a deportation order.

The Court refused to make absolute a rule for a writ of certiorari to bring up, for the purpose of quashing it, an order made by the Home Secretary under the above-mentioned Act and Order that the alien "shall be deported from the United Kingdom," the order being in form a valid order, though the Home Secretary stated that it was intended under the order to send the alien to a particular country.

Judgment of the Divisional Court, ante, p. 552, reversed.

Appeal from an order of the Divisional Court (Viscount Reading C.J., Ridley and Bray JJ.) making absolute a rule nisi for a writ of certiorari to remove into the King's Bench Division an order for the deportation of the respondent (the applicant for the rule) in order that it might be quashed; reported ante, p. 552.

The respondent was a French subject of military age and liable to military service in France who had for some years been resident in England. On November 3, 1916, the Secretary of State for Home Affairs made an order for the deportation of the respondent which

was in these terms: "In pursuance of the powers conferred by the Aliens Restriction Act, 1914 (1), and art. 12 of the Aliens Restriction (Consolidation) Order, 1916 (2), I hereby order that" (the respondent) "an alien, shall be deported from the United Kingdom." It was admitted by the Attorney-General on behalf of the Secretary of State that this order was made with the intention and for the purpose of sending the respondent to France and thereby placing him within the power of the military authorities in France.

The respondent obtained the rule upon the grounds (inter alia) that he was a political refugee from France; that there were no facts or materials before the Secretary of State to justify the making

(1) 4 & 5 Geo. 5, c. 12, s. 1, sub-s. 1: "His Majesty may at any time when a state of war exists between His Majesty and any foreign power, or when it appears that an occasion of imminent national danger or great emergency has arisen, by Order in Council impose restrictions on aliens, and provision may be made by the Order . . . . (*b*) for prohibiting aliens from embarking in the United Kingdom, either generally or at certain places, and for imposing restrictions and conditions on aliens embarking or about to embark in the United Kingdom; and (*c*) for the deportation of aliens from the United Kingdom; . . . . (*h*) for imposing penalties on persons who aid or abet any contravention of the Order, and for imposing such obligations and restrictions on masters of ships or any other persons specified in the Order as appear necessary or expedient for giving full effect to the Order; and (*i*) for conferring upon such persons as may be specified in the Order such powers with respect to arrest, detention, search of premises or persons, and otherwise, as may be specified in the Order, and for any other ancillary matters for which it appears expedient to provide with a view to giving full effect to the Order; and (*k*) for any other matters which appear necessary or expedient with a view to the safety of the realm."

(2) The Aliens Restriction (Consolidation) Order, 1916, art. 12, clause 1: "A Secretary of State may order the deportation of any alien, and any alien with respect to whom such an order is made shall forthwith leave and thereafter . . . . remain out of the United Kingdom."

Clause 2: "Where an alien is ordered to be deported under this Order, he may, until he can, in the opinion of the Secretary of State, be conveniently conveyed to and placed on board a ship about to leave the United Kingdom, and whilst being conveyed to the ship, and whilst on board the ship until the ship finally leaves the United Kingdom, be detained in such manner as the Secretary of State directs, and whilst so detained, shall be deemed to be in legal custody."

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of the order; and that there was no power to order his expulsion to France. (1)

The Divisional Court held that a Secretary of State had no power to order the deportation of an alien to any particular country and made the rule absolute. The Secretary of State for Home Affairs appealed.

Sir Frederick Smith, A.-G., and *Roche, K.C.* (*Branson* with them) for the appellant. It is immaterial to consider whether the respondent is or is not a political refugee, or whether he is medically fit for military service. Those matters may be proper to be taken into account by the Home Secretary in considering whether he will exercise his discretion by making a deportation order. The Home Secretary, however, desires it to be stated that he has no intention of ordering political refugees to be deported. Even if those matters were material, the respondent has failed to substantiate either of them.

At common law the King has power to deport aliens to their own country. Dealing with the admission of strangers who come to this country spontaneously, it is stated in Blackstone's Commentaries, i. 259, 260, that "so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the King's protection, though liable to be sent home whenever the King sees occasion." See also Westlake's International Law, 1910 ed., "Peace," p. 217. Aliens therefore can be "sent home" by a deportation order. The Crown possesses the power to deport an alien to the country whence he came: *Attorney-General for Canada* v. *Cain*. (2) Every country which extends its hospitality to an alien can terminate the hospitality, and can do so by sending the alien back to his own country. Any other country might refuse

(1) The respondent made an affidavit with the view of showing that he was a political refugee, and that he was medically unfit for military service. The French authorities denied that he was a political refugee, and an assurance was given by them to the British Government, as will be seen from the judgments herein, that he would not be treated as such. It was stated that the order of deportation was made in consequence of an arrangement between the British and French Governments under which French subjects of military age who are resident in this country are returned to France.

(2) [1906] A. C. 542, 547.

to receive him. That is a principle to be borne in mind when construing the Act and Order in Council under which the Home Secretary purported to act in the present case. Sect. 1, sub-s. 1, of the Aliens Restriction Act, 1914, gives wide power by an Order in Council to make provision for, among other matters, "(*c*) the deportation of aliens from the United Kingdom." That and the other clauses of the sub-section show that the word "deport" involves deportation to a named place. Indeed, the word "deport" of itself involves the carrying to the place of destination. Arts. 8—12 of the Aliens Restriction (Consolidation) Order, 1916, carry out the provisions of s. 1, sub-s. 1, of the Act of 1914. Art. 12, clause 1, provides that "A Secretary of State may order the deportation of any alien," and clause 2 gives the Secretary of State full control over the alien's movements until he has left this country. The Oxford English Dictionary defines "deportation" as "the action of carrying away; forcible removal, especially into exile; transportation." See also Johnson's Dictionary, edition by Latham, "Deportation." An alien cannot be deported except by ship, and the choice of the ship must be left to the person who orders the deportation. In ss. 3 and 4 of the Aliens Act, 1905 (5 Edw. 7, c. 13), which deal with undesirable aliens, the word used is "expulsion." The person expelled cannot choose the place to which he shall be expelled. The same meaning should be given to the word "deportation" in the Order in Council. One of the "restrictions and conditions" which by s. 1, sub-s. 1 (*b*), of the Act may be imposed on aliens is that they shall embark at a port and be sent to a port selected by the Secretary of State; and provision may, under sub-s. 1 (*k*), be made for any other matters which appear necessary or expedient with a view to the safety of the realm. "Those who are responsible for the national security must be the sole judges of what the national security requires": *The Zamora.* (1) To leave the kingdom the alien must embark on board a ship, and by reg. 14C of the Defence of the Realm (Consolidation) Regulations, 1914, before an alien can embark he must have a passport, and by art. 8 of the Aliens Restriction (Consolidation) Order, 1916, an alien shall not, except in pursuance of an order of deportation, embark at a prohibited port. Unless the Secretary of State can name the port

(1) [1916] 2 A. C. 77, 107.

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of embarkation art. 8 will give a deported alien the power to embark at a prohibited port. The true view is that the Act and Order made under it give the Secretary of State the power of selecting the ports of embarkation and destination. This point was left undecided in *Rex* v. *Governor of Brixton Prison.* (1) If the decision of the Divisional Court is right, an alien, who is a German, might claim to be sent to Holland, whence he could go to Germany.

Further, the deportation order in the present case does not name the place of destination, and is therefore in any view a valid order. The Home Secretary, however, desires a decision of the Court upon the question whether the order can lawfully specify the place to which the alien is to be deported. It may be sufficient for the order to state generally that the alien shall be deported, and art. 12, clause 2, gives the Secretary of State control over the alien's movements so that he can select the ship by which the alien is to be deported. [*In re Adam* (2) was also referred to.]

Rawlinson, K.C., and *Barrington-Ward*, for the respondent. There is no authority for the proposition that the Executive Government of this country has power by the common law to order an alien to be sent to any particular country. The dictum in Blackstone's Commentaries, i. 260, that an alien is "liable to be sent home", is too vague to support the proposition. If the Crown can, without express statutory power, order an alien to be deported to a particular country the provisions of the Aliens Act, 1905, which deal with the expulsion of undesirable aliens, would be unnecessary. The Crown has the inherent right to prevent aliens landing, but when they are here the Crown cannot order them to leave unless a statute empowers it to do so. The statement in Westlake's International Law, 1910 ed., "Peace," p. 217, that a State "is free to exercise its discretion by expelling those already resident as well as by declining to admit them in the first instance," is too wide. But if the Crown can expel aliens from this country, it cannot either at common law or under the powers conferred on it by the Aliens Restriction Act, 1914, deport an alien to a particular place. The Act and the Order made under it authorize the "deportation" of an alien. Sect. 1, sub-s. 1 (*c*), of the Act gives the Crown power by Order in Council to make provision "for the deportation of

(1) [1916] 2 K. B. 742. (2) (1838) 1 Moo. P. C. 460.

aliens from the United Kingdom," not for transportation to a particular country. "Deportation" of itself means carrying from a country. Art. 12, clause 1, of the Aliens Restriction (Consolidation) Order, 1916, quite properly only authorizes a Secretary of State to order "the deportation" of an alien. The alien "shall forthwith leave and thereafter remain out of the United Kingdom." Those words involve volition. Under that provision an alien ordered to be deported has power to select a port of destination which is reasonably fit for the purpose. The choice of the port of destination lies with him under that clause. If he fails to leave the country within a reasonable time the Executive can either proceed against him summarily under s. 1, sub-s. 2, of the Act, or may under clause 2 of art. 12 direct him to be detained until he can be placed on board a ship about to leave the United Kingdom. The coming into operation of clause 2 is conditional upon the alien not complying with clause 1. Reg. 14c of the Defence of the Realm (Consolidation) Regulations, 1914, was framed for a different purpose and has no application to the Aliens Restriction Act, 1914. It is said that the order of the Home Secretary is good upon its face and therefore cannot be quashed. But the Home Secretary admits that he is going to use the order for the purpose of deporting the respondent to France, that is to say, for an illegal object. If an order, good on its face, is going to be used for a purpose for which it cannot properly be used, the order then becomes an engine of oppression and is bad, and the Court will intervene and quash it. It will not allow an order to stand which is going to be used for a wrongful purpose.

Roche, K.C., in reply.

Cur. adv. vult.

March 16. SWINFEN EADY L.J. read the following judgment:— This is the appeal of the Home Secretary against an order of the King's Bench Division which made absolute a rule for a certiorari to quash a deportation order. This deportation order is dated November 3, 1916, and thereby, in pursuance of the powers conferred by the Aliens Restriction Act, 1914, and art. 12 of the Aliens Restriction (Consolidation) Order, 1916, the Home Secretary ordered that Leon Joseph Armand Derais, alias Leon Armand Joseph

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Derais-Bouillon, alias Duke of Château Thierry, an alien, should be deported from the United Kingdom.

The alien in question, the respondent to this appeal, was born at Havre, in the Republic of France, in 1875. About February, 1905, he left France and proceeded to Belgium, and early in 1907 he came to England, where he has since resided. That he is an alien is not disputed. In July last inquiry was made at the request of the French Government as to the failure of the respondent (who is a Frenchman, within military age, whether reckoned according to the French or the British standard) to discharge his military duties. The respondent claimed to be a political refugee, and inquiry was made of the French authorities to ascertain whether his claim was justified. These authorities dispute that he is a political refugee; they state that his return to France is sought in connection with his "irregular military situation," and for no other cause, and that he is not known to the French police for any other offence. An assurance has been given by the French Government that the respondent, if returned to France, would be treated as a military absentee, and not as liable to prosecution for any other offence. The respondent also alleges that he is medically unfit for military service. Two opportunities have been afforded him to satisfy the French authorities here in this respect, but he has declined to do so. Although he may be unfit for combatant service, he has made several attempts to obtain a commission in the British Army, and, moreover, states in his affidavit that he is about to be appointed managing director of a new company; it is quite consistent with the evidence that he may be fit, not for a combatant position, but for certain kinds of military service, and may be able to render valuable assistance to the military authorities of his country.

I am of opinion that the respondent has failed to establish that he is a political refugee, or that he is medically unfit to render to his native country any military service whatever. But, whether this be so or not, these considerations ought not to affect the judgment in the present case. These are matters to be brought before the Home Secretary when he is considering whether or not to make a deportation order, and they are matters which may properly affect his discretion; but his power to make a deportation order is not dependent in any way upon the absence of these or any similar

circumstances. By art. 12, clause 1, of the Aliens Restriction (Consolidation) Order, 1916, a Secretary of State may order the deportation of any alien. The respondent is an alien, and a Secretary of State has made an order for his deportation. It should, however, be stated that the Attorney-General on behalf of the Government expressly stated that the Executive had no intention whatever of taking advantage of their powers over aliens to deport political refugees. It will be remembered that under the Aliens Act, 1905, which confers power to prevent the landing in this country of undesirable immigrants, an exception is made in favour of an immigrant who proves that he is seeking admission to this country to avoid prosecution on political grounds, or for an offence of a political character. Again, with regard to the expulsion of undesirable aliens, the same statute confers power on the Secretary of State to make (under certain specified circumstances) an expulsion order requiring an alien to leave the United Kingdom within a time fixed by the order; such order may be made upon the happening of the events respectively mentioned in s. 3 of the Act, but s. 3, sub-s. 1 (*b*) (ii.), excludes from liability to expulsion such an alien as is there mentioned, who has been sentenced in a foreign country for a crime which is an offence of a political character. This statute gives effect to the policy of this country in affording shelter and protection to political refugees. The language of this statute is in marked contrast with the language of the Aliens Restriction Act, 1914. The latter Act contains none of the safeguards of the former Act, but in a time of great national danger confers wide powers upon a Secretary of State, leaving the exercise of those powers to his discretion, and for the proper exercise of which he is responsible to Parliament and the country.

It is urged by the respondent that the Executive Government claims and intends to exercise over him, by virtue of the Act and Order, an authority not thereby conferred. The Government claim not merely a right to deport the alien but to select the country or place to which he is to be deported. The Divisional Court held that there was not any power under the statute or in the regulations to order the deportation of an alien to any particular country; that they must look behind the order, and if the object and intention of the Executive in making the order was to deport the alien to a

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particular foreign country they must treat this matter as if the order did in effect state that the alien was to be deported to France. So regarding it, the Court made absolute the rule for a certiorari to quash it.

I am unable to follow this reasoning. If it were intended to do something illegal under a valid order, that would be good ground for restraining and preventing the illegal act, but not for quashing a valid order. A Secretary of State is not required to justify in a Court of law his reasons for making a deportation order in the case of an alien. In the event of it being disputed that the subject of a deportation order is an alien, the matter must be determined by the Court, and unless it be proved that the person is an alien the order must be quashed as made without jurisdiction ; but I am not aware of any other ground upon which such an order can be quashed.

Under these circumstances, the respondent being an alien, I am of opinion that the order of the King's Bench Division for the quashing of the deportation order was erroneous. In strictness this is sufficient to dispose of the appeal, but the Attorney-General stated that it was intended to convey the respondent to France, but that before doing so the Government wished to give him every opportunity of testing in a Court of law whether they had that power or not, and that they were holding their hands in the meantime. Whether a Secretary of State has this authority or not depends upon the true construction of the Aliens Restriction Act, 1914, and the Orders in Council made thereunder. This statute was passed the day after the commencement of the war between this country and Germany. It empowers His Majesty, by Order in Council, to impose restrictions on aliens at any time when a state of war exists between His Majesty and any foreign Power, or when it appears that an occasion of imminent national danger or great emergency has arisen. It enacts that provision may be made by the Order in Council for various specified matters. [The Lord Justice read s. 1, sub-s. 1 (*b*), (*c*), (*h*), (*i*), and (*k*).] I am of opinion that clause (*c*) alone does not extend to authorize an Order in Council for the deportation of aliens to any particular place, but merely to provide for their deportation from the United Kingdom, and that the form of order adopted in the present case was the proper form of order—namely, that the respondent, "an alien, shall be deported

from the United Kingdom." The deportation order, however, compels the alien to leave the United Kingdom, which he can only do by embarking on a vessel, and paragraphs (*b*), (*h*), (*i*), and (*k*) of s. 1, sub-s. 1, of the Act of 1914 authorize provisions in the Order in Council, whereby restrictions, conditions, and obligations may be imposed which effectively control the deported alien's subsequent movements. The Aliens Restriction (Consolidation) Order, 1916 (being No. 122 of the Statutory Rules and Orders, 1916), embodies the various Orders in Council made under the Aliens Restriction Act, 1914.

Art. 12 regulates the deportation of aliens. In my opinion clause 1 and clause 2 of art. 12 are independent of each other, and the contention is not well founded that clause 2 only becomes operative if and when an alien, ordered to be deported, omits to leave the United Kingdom after being allowed a reasonable time to do so. Where a Secretary of State makes a deportation order he may (if in his judgment it is a proper case so to do) leave the alien at large and free to leave the kingdom upon complying with the other provisions of the Order. If the alien fails to do so, he incurs the penalties provided by s. 1, sub-s. 2, of the Act. On the other hand, a Secretary of State may (if in his judgment it is proper so to do) immediately upon making a deportation order cause the alien to be detained and placed on board a ship, and detained on board that ship until the ship finally leaves the United Kingdom, when his right to detain the alien any longer ceases. It is essential to give due effect to this provision that the Secretary of State should select and determine the ship upon which the alien is to be placed, and by thus selecting the ship the destination of the alien may be determined.

The conclusion at which I arrive is that, although the Executive Government has no power to order a deported alien to go to any particular place, yet by the authority given it to detain the alien and place him on board a ship (which I construe as meaning a ship which the Government select) and detain him there until the ship finally leaves the United Kingdom, the result may be that the alien will have to disembark in the country to which that ship shall directly sail. After the ship finally leaves the United Kingdom the Government cannot any longer detain him, but in most cases there would be practical difficulty in the alien leaving the ship before she makes the port to which she is bound.

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I much regret the irregular manner in which this important question was submitted to the Court below and has been submitted to us, but it has not been shown that the Secretary of State had issued or was issuing any instructions to the police in excess of any authority conferred upon him by law.

The appeal should be allowed and the order of the Divisional Court reversed, and the rule for a certiorari should be discharged.

Swinfen Eady L.J.

PICKFORD L.J. read the following judgment:—The respondent in this appeal obtained a rule nisi to remove into the High Court of Justice for the purpose of being quashed an order made by the Secretary of State for the Home Department. The order was in these terms: [The Lord Justice read the order.] The rule was made absolute by the King's Bench Division, and the Secretary of State now appeals against that decision.

The respondent is a French subject of military age, who has been resident in this country for several years. He alleges that he left France in circumstances which constitute him a political refugee, and that he is medically unfit for military service. We were informed that there exists an agreement between this country and France by which this country undertakes to return to France subjects of that country who are of military age and liable to military service, and that it was by reason of that agreement that the Secretary of State made this order. It was also stated to us by the Attorney-General that it was the intention of the Executive to return the respondent to France, and to require him not only to leave this country but to return to his own. The order on the face of it, however, is only an order that the respondent be deported, and if that be a valid order it cannot be quashed. Even if an attempt were made to carry it out by illegal means the order would not be invalidated, though I do not say that in such a case there would be no remedy.

The question, therefore, is whether the order is validly made under the Aliens Restriction Act, 1914, and the regulations made under that Act. The principal clauses relating to this matter are s. 1, sub-s. 1 (*c*), of the Act and art. 12 of the regulations.

I think the order is a perfectly good order. The power given to the Secretary of State is quite unqualified. If the person ordered

to be deported be in fact an alien, the Secretary of State has an absolute discretion to order him to be deported, and I do not think that discretion can be questioned in a Court of law. Assuming, therefore, that the respondent proved that he was a political refugee and unfit for military service, these facts would not affect the validity of the order, but would only be matters to be considered by the Secretary of State as affecting the exercise of his discretion. It may be noticed that the Aliens Restriction Act of 1914 contains no provisions as to political refugees similar to those in the Aliens Act of 1905, but it was stated by the Attorney-General that the British Government has no intention of enforcing the provisions of the Act of 1914 against such refugees.

The order was therefore, in my opinion, made by the Secretary of State in due exercise of his powers under the Act and regulations and cannot be quashed.

But the Attorney-General asked us to decide whether the Act and regulations give the Secretary of State power to order the deportation of an alien to a destination specified by him. If that means whether an order could be made under the powers of s. 1, sub-s. 1 (*c*), and the regulations made under it to deport the alien to a specified place, I do not think it could. The power is merely to order deportation, and I do not agree that the meaning of the word "deport" involves carrying to a destination. It is, I think, quite satisfied by obliging the alien to go out of this country, leaving the destination to which he goes undetermined.

I think the Divisional Court took the Attorney-General's submission as an agreement to treat the order as though for the purposes of this case it contained a direction to deport to a particular place, and therefore treated it as made in that form and so quashed it, but I cannot find any agreement that it should be so treated, and therefore I think it should not be quashed. The order is made under reg. 12, which contains two sub-sections, which I think are independent—that is, I do not think that sub-s. 2 only comes into force in case of a failure to comply with sub-s. 1.

The Secretary of State has two courses open to him. If he considers it safe to leave the alien at large he may rest himself only on sub-s. 1, and then it seems to me the alien is at liberty to choose his ship and his destination. If, on the other hand, he considers it

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right that the alien should not be left at large, he may act under sub-s. 2 and detain him as therein provided. I think the wording of that sub-section requires that the Secretary of State should have the choice of the ship upon which the alien is placed. When on board he remains in legal custody until the ship finally leaves the United Kingdom, and then the custody of and right to detain the alien ceases. It is quite possible that the result of action under this provision may be that the deportee from the force of circumstances may be compelled to disembark in the country to which the Government wish him to go. This question does not, however, arise upon the facts now before us, nor do the other points raised as to the practical effect of others of these regulations and those made under the Defence of the Realm Act.

BANKES L.J. read the following judgment :—The Aliens Restriction Act, 1914, was passed, as its title implies, to enable His Majesty in time of war, or imminent national danger or great emergency, by Order in Council to impose restrictions on aliens and make such provisions as appear necessary or expedient for carrying such restrictions into effect. It received the Royal assent on August 5 of that year. It provides by sub-s. 1 of s. 1 that His Majesty may at any time when a state of war exists by Order in Council impose restrictions on aliens, and that provision may be made by the Order, inter alia, (*b*) for imposing restrictions and conditions on aliens embarking or about to embark in the United Kingdom, (*c*) for deportation of aliens from the United Kingdom, (*i*) for conferring upon such persons as may be specified in the Order such powers with respect to arrest, detention, search of premises or persons as may be specified in the Order, and for any other ancillary matters for which it appears expedient to provide with a view to giving full effect to the Order. Sub-s. 2 provides for penalties for failing to comply with any provisions of any such Order.

The first Aliens Restriction Order made under the statute is dated August 5, 1914. This Order was subsequently revoked and the Order of September 9, 1914, was substituted for it. In each of these Orders art. 12 is the one which deals with the deportation of aliens. The change of language in sub-s. 2 is significant. The first Order ran : " Where an alien is ordered to be deported under

this Order, he may, whilst awaiting the departure of his ship . . . . be detained." The substituted Order runs: "Where an alien is ordered to be deported under this Order, he may, until he can, in the opinion of the Secretary of State, be conveniently conveyed to and placed on board a ship about to leave the United Kingdom," be detained. The Order of September 9 has in its turn been revoked, and the Order now in force is that of February 29, 1916 (as amended by the Order of November 6, 1916), in which the language of art. 12 of the Order of September 9 is reproduced without any alteration material for consideration in this appeal. Art. 12, sub-s. 1, is quite general in its language, and it appears to me to offer no difficulties of construction. It applies to all aliens, whether alien enemies or alien friends. It confers upon the Secretary of State an unlimited discretion. He may order the deportation of any alien. It is impossible for any Court of law to interfere with the exercise of that discretion, whether he exercises it because he considers the presence of an alien in this country undesirable on account of his character or antecedents or because he considers it undesirable that he should remain in this country when his services are required in time of war by an allied country of which he is either a subject or a citizen. On November 3, 1916, an order was made for the deportation of the respondent. It purports to be made by the then Secretary of State for the Home Department under the powers of the Act of 1914 and art. 12 of the Order of 1916. It orders that the respondent, under the name therein given, "an alien," shall be deported from the United Kingdom. It is plain from the terms of the order that the Secretary of State in making the order was purporting to act under the powers conferred upon him by the Act and Order mentioned in it, and under those powers only. It is immaterial, therefore, in my opinion, to consider what the inherent prerogative of the Crown may be in reference to the deportation of any person from the realm, or to consider whether the particular point which was discussed in the argument before this Court is covered either by the passage from Blackstone (1) which was cited, or by the judgment in the case of *Attorney-General for Canada* v. *Cain*. (2) The only question directly raised by this appeal is whether the order of the Divisional Court quashing the

(1) Blackstone's Commentaries, i. 260. (2) [1906] A. C. 542.

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Bankes L.J.

order of deportation can be supported. In my opinion it cannot. The respondent does not dispute that he is an alien—an alien friend, it is true, but none the less, within the meaning of art. 12 of the Order of 1916, an alien. The respondent has filed a long affidavit in which he sets up matters which may be material for the consideration of the Secretary of State in exercising his discretion, but which are wholly immaterial for our consideration when considering his jurisdiction. Upon the contents of the affidavit I will only make this one observation, namely, that the respondent appears to treat a fitness for military service and a fitness for combatant service as being the same thing, which they obviously are not. I see no ground whatever for saying that the deportation order was not properly and validly made.

Strictly speaking that ought to be an end of the case; but the Court below was asked, and this Court is asked, to express an opinion upon the contention put forward by the Attorney-General that under this art. 12 of the Aliens Restriction (Consolidation) Order a Secretary of State has the right and the power, not only to deport a person from this country, but to deport such person to some particular place or country. This proposition is stated in very wide terms, and covers not only the end to be attained, but the means of attaining it. In my opinion that proposition is too widely stated, and the Divisional Court were quite right in refusing to accept it. The powers of the Secretary of State are quite clearly defined by the article, and they do not, in my opinion, justify the contention put forward by the Attorney-General in the very wide terms in which he formulated it. The first sub-section of art. 12 deals with the making of the deportation order and with that alone. If the deportee leaves the country upon the making of the order and before the Secretary of State takes further action, there is an end of the matter. What is to happen if the order is not complied with must be found elsewhere than in the first sub-section. If it is intended to punish the individual for not complying with the order, the necessary machinery is to be found in s. 1, sub-s. 2, of the Aliens Restriction Act, 1914. If it is intended to compel the individual to comply with the order, the necessary machinery is to be found in sub-s. 2 of art. 12. This sub-section enables the Secretary of State to direct the detention of any person against whom an order

of deportation has been made from the moment the order is made until the ship upon which the deportee is placed "finally leaves the United Kingdom." Whenever that moment arrives the legal custody of the deportee ceases, and he is free to make such use of his liberty as he can.

In the present case no information is given to the Court as to the precise terms of any direction given by the Secretary of State under sub-s. 2 of art. 12. All we are told is that on December 29, 1916, a letter was written from the Home Office to the respondent's solicitor informing him that the Secretary of State had instructed the Commissioner of Police to enforce the deportation order on January 3 next, and that at the request of the respondent's solicitor any proceedings under such direction were suspended pending these proceedings. Under these circumstances I am not prepared to express any opinion as to the legality or otherwise of the next step which the Secretary of State may be proposing to take, and I think it extremely undesirable that the Court should be asked in questions of this importance to express an opinion upon a hypothetical state of facts. Having regard, however, to the fact that the Divisional Court dealt with this case in the way they did, I give it as my opinion that, having regard to the passport and permit regulations contained in reg. 14c of the Defence of the Realm (Consolidation) Regulations, 1914, and in art. 8 of the Aliens Restriction (Consolidation) Order, 1916, and to the power of imposing restrictions and conditions upon aliens about to embark conferred by the Act of 1914, under which sub-s. 2 of art. 12 may be said to fall, the Secretary of State has the power to select the vessel on which the deportee is to be placed; but sub-s. 2 of art. 12 in terms provides that, assuming he has that power, the legal custody of the deportee comes to an end directly that vessel finally leaves the United Kingdom. It may well be that the deportee will be unable to leave the vessel until it arrives at its destination, and the result of the action of the Secretary of State may consequently be that the deportee will from the necessities of the case be obliged to disembark in the country to which it was desired that he should go, but this is not an absolutely necessary consequence of the deportation order and the consequent direction of the Secretary of State made under sub-s. 2 of art. 12.

The Divisional Court were apparently asked to give a decision

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upon the contention of the Attorney-General, and, as I have already stated, I think that they were right in refusing to accept it in its entirety, but I cannot agree with the reasons for their decision, or with their conclusion that, because they could not accept the Attorney-General's contention to the full, the deportation order should be quashed.

In my opinion the appeal succeeds.

Appeal allowed.

Solicitors for appellant: *Treasury Solicitor.*
Solicitor for respondent: *Shoubridge & Becher.*

W. F. B.

1917 *March* 19.

THOMAS *v.* TYNE AND WEAR STEAMSHIP FREIGHT INSURANCE ASSOCIATION.

Marine Insurance—Time Policy—Ship Unseaworthy in Two Respects—Assured privy as to the one—Loss of Ship attributable to the other—Liability of Insurer—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 39, *sub-s.* 5.

The "loss attributable to unseaworthiness," for which under s. 39, sub-s. 5, of the Marine Insurance Act, 1906, the insurer under a time policy is not to be held liable, is a loss attributable to unseaworthiness to which the assured was privy.

A ship which was insured under a time policy was at the time of her being sent to sea unseaworthy in two respects: her hull was in an unfit state for the voyage, and her crew was insufficient. The assured knew of the insufficiency of the crew but not of the unfitness of the hull. The ship was lost on the voyage by reason of her unseaworthiness in the latter respect:—

Held, that the sub-section afforded no defence to the insurers.

CASE stated by an arbitrator.

The claimant, H. S. Thomas, was the manager of the steamship *Dunsley*. By a policy of marine insurance the respondents insured the claimant from February 20, 1911, to February 20, 1912, in respect of the said steamship "on brokerages profits advances contributions to and premiums of insurance and disbursements in the sum of 500*l.* payable in the event only of actual or constructive total loss." By the terms of the policy any dispute was to be

referred to arbitration. A dispute having arisen, the matter was referred to an arbitrator, who made his award in the form of a special case for the opinion of the Court.

The facts found by the arbitrator were as follows:—On July 3, 1911, the *Dunsley*, while on a voyage from Port Talbot with a cargo of coal bound for Nantes, stranded in the river Loire, and was aground till July 8. The ship was then floated and proceeded on her voyage to Nantes, where she discharged her cargo of coal and loaded a cargo of iron for Rotterdam. On her way down the Loire from Nantes on July 22 she again took the ground. She went on to Rotterdam and discharged her cargo. On August 29 she was despatched by the claimant from Appledore in the Bristol Channel bound for Birkenhead with a crew consisting of the captain and seven runners. In the course of that voyage the ship sprung a leak and was lost from perils insured against. The cause of that leak and of the consequent loss of the ship was damage and straining which she had sustained through grounding in the Loire in the previous month, and by reason of that damage she was on sailing from Appledore unfit for the voyage, but the claimant was not aware of that damage and was not privy to sending the ship to sea in an unseaworthy condition so far as that damage was concerned. On the other hand the claimant was privy to sending the ship to sea with an insufficient crew, but that insufficiency of the crew did not cause or contribute to her loss. Under those circumstances the arbitrator found that the claimant was entitled to recover a total loss upon the policy.

Stuart Bevan, for the respondents. The plaintiff is not entitled to recover on the policy, for the respondents are protected by s. 39, sub-s. 5, of the Marine Insurance Act, 1906. (1) Here the claimant, the assured, sent the ship to sea with an insufficient crew. In that respect it was unseaworthy, and it was unseaworthy with his privity. Secondly, the arbitrator has found that the loss of the ship was due

(1) By s. 39, sub-s. 5, of the Marine Insurance Act, 1906, "In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness."

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to unseaworthiness. Therefore both the conditions of the sub-section are satisfied. It does not say that the unseaworthiness which causes the loss must be the same unseaworthiness as that to which the assured is privy. The words are perfectly general.

MacKinnon, K.C., and *Raeburn*, for the claimant, were not called upon.

ATKIN J. In this case the claimant was insured under a policy of marine insurance "on brokerages profits advances contributions to and premiums of insurance and disbursements payable in the event only of actual or constructive total loss" in respect of a ship called the *Dunsley*, which was totally lost on a voyage from Appledore to Birkenhead. The arbitrator found that when the ship left Appledore she was unseaworthy in two respects: she was unfit for the voyage on which she was lost in consequence of damage which she had sustained as the result of strandings during a previous voyage, and secondly her crew was insufficient. The arbitrator found that the claimant was not privy to the unfitness of the ship, but that he was privy to the insufficiency of the crew. He further found that the loss of the ship was attributable solely to the unfitness of the hull, and not in any degree to the fact of the crew being insufficient. A claim being made under the policy, the insurers relied on s. 39, sub-s. 5, of the Marine Insurance Act, 1906, as relieving them from liability. That sub-section provides that "In a time policy there is no implied authority that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness." It was contended by the insurers that as it was found that the ship was sent to sea in an unseaworthy state, namely, with an insufficient crew, with the privity of the assured, and that the loss of the ship was attributable to unseaworthiness in respect of the unfitness of the hull, they were protected. But I do not think that that is the proper construction of the sub-section. I think it means that the insurer is not to be liable for a loss attributable to unseaworthiness to which the assured was privy. In the case of insurance under a time policy the intention was that the assured should be unable to recover in respect of

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Atkin J.

a loss occasioned by his own fault. That was the rule under the law as it existed before the Act. It was always necessary to show that the loss was the result of some misconduct. Now the statute has defined the degree of misconduct required as sending the ship to sea in an unseaworthy state with the privity of the assured. Where a ship is sent to sea in a state of unseaworthiness in two respects, the assured being privy to the one and not privy to the other, the insurer is only protected if the loss was attributable to the particular unseaworthiness to which the assured was privy. The other view would be unreasonable. For instance, if a ship were sent to sea with a defective equipment, and subsequently during the course of the voyage became unseaworthy in some totally different respect which caused its loss, if the present insurers' contention is right the assured could not recover. I think the arbitrator's construction was correct. There must be judgment for the claimant.

Judgment for the claimant.

Solicitors for claimant: *Rawle, Johnstone & Co., for J. Harvard Davis, Cardiff.*

Solicitors for respondents: *Waltons & Co.*

J. F. C.

1917
March 8, 9, 19, 21.

ROGERS *v.* WHITTAKER.

[1916 R. 287.]

Insurance—Fire—Fire caused by Enemy Airship—Exception—"Loss resulting from military power."

Damage by fire caused by a bomb from an enemy Zeppelin is within the exception in a policy of fire insurance of damage "resulting from insurrection, riots, civil commotion, or military or usurped power."

ACTION tried before Sankey J. without a jury, as a commercial cause.

The following statement of facts is taken from the written judgment of Sankey J. :—

This is a claim on a fire insurance policy. On September 8, 1915, the night of a Zeppelin raid on London the plaintiff's warehouse at Nos. 9, 10, and 11, Addle Street was burnt to the ground, and he is claiming that under the policy above referred to he is entitled to be indemnified against loss by the defendant.

The defendant says that under the policy "no claim is to attach for a loss or damage resulting from insurrection, riots, civil commotion or military or usurped power." He contends that the loss was occasioned by an incendiary bomb dropped from a Zeppelin, and that he is excused under the above words as the loss results from an exercise of military power. He further says that if those words do not cover him, the policy ought to be rectified by inserting words which will excuse him from paying. Three points, therefore, fall for decision—(1.) whether the fire was caused by an incendiary bomb from a Zeppelin ; (2.) if so, whether such a loss is excluded from the policy ; (3.) if not, whether the policy ought to be rectified so as to exclude such a loss.

Leslie Scott, K.C., and *Rowand Harker*, for the plaintiff.
Roche, K.C., and *Hastings*, for the defendant.

Cur. adv. vult.

March 21. SANKEY J. (1), after stating the facts as above set out proceeded : As to (1.) : Was the fire caused by an incendiary bomb ?

(1) The judgment was written.

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The evidence is all one way. A Zeppelin was observed in the sky over the premises in question, a witness saw a black object dropping from it, and immediately afterwards a fire started. When the salvage corps arrived on the scene the plaintiff's warehouse was the only one alight, and therefore it could not have been set on fire from neighbouring premises. Still further, when the warehouse was being rebuilt, the remains of an incendiary bomb were found on a sill of one of the windows. I find that the premises were set on fire by an incendiary bomb dropped from a Zeppelin.

As to (2.): Was a loss occasioned by fire caused by an incendiary bomb dropped from a Zeppelin excluded from the policy? I proceed to discuss the matter upon the hypothesis that the loss was occasioned by the exercise of foreign military power. The learned counsel for the defendant contended that such a loss was excluded from the policy, upon the ground that the exercise of military power, whether by our own or an enemy country, came within the exception clause. The learned counsel for the plaintiff was equally confident that the clause did not exclude it. He pointed to the words, the first three of which he said referred to internal incidents, and contended that the word "military," like a chameleon, took its colour from its surroundings and must be held to refer only to the military power of our own country. *Drinkwater* v. *London Assurance Corporation* (1) was cited. In that case a loss by fire caused by a mob to a malting-house at Norwich was held not to be excluded from a policy by an exception clause which provided that the corporation should not be liable in case the malting-house should be burnt "by an invasion of foreign enemies or any military or usurped power whatsoever." Happily it is the only case in English law on the subject, and each learned counsel, perhaps not unnaturally, strongly relied upon it as being in his own favour. Mr. Roche prayed it in aid as being a direct decision that military power meant foreign military power. Mr. Scott replied that the collocation of the words in the exception clause must be studied, and that as it began with the words "invasion of foreign enemies" the principle of noscitur a sociis applied and the Court could have come to no other conclusion than it did. I quite appreciate both doctrines, namely, that each word must be given its full and natural meaning, and that

(1) (1767) 2 Wils. 363.

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a word must be interpreted with regard to its surroundings; but attention must be paid to both, and neither the one nor the other must be arbitrarily excluded. In my view *Drinkwater's Case* (1) is not conclusive on the point, and I must endeavour as best I can to form my own conclusion on the matter, although, as Wilmot C.J. says at the end of his judgment, "Amongst armies, great guns and bombs, the laws are silenced, and the wisdom or courage of an individual will signify nothing." It seems to me that the clause has two limbs—(1.) insurrection, riots, civil commotion; (2.) military or usurped power. The first refers to domestic disturbances of different degrees of intensity, from the insurrection down to the civil commotion. These last words were explained in Lord Mansfield's famous summing-up in *Langdale* v. *Mason* (2), which has recently been discussed by Hamilton L.J. in *London and Manchester Plate Glass Co.* v. *Heath* (3), where the learned Lord Justice refers to the interesting history of the clause in question in fire policies, which apparently saw the light soon after the rebellion of 1715.

Turning to the second limb, I think that, without saying the words of the first contain an exhaustive definition of mere domestic disturbance, the words "military or usurped power" seem to open a new and another category of excepted events, to import something more than mere internal incidents, and to refer to events of a different character from those included in the first limb. They are certainly of a more serious significance than is implied by the "civil commotion" immediately preceding them. This seems a more natural interpretation, and obviates any suggestion of redundancy which might possibly arise from a construction which makes the last words "military or usurped power" only mean, or partly mean over again, the domestic incidents referred to by the first words "insurrection, riot, and civil commotion," especially when, as above pointed out, civil commotion seems to be the last and least of the domestic incidents. Nor can it be properly contended that the words "military power" do not refer to military power of a Government lawfully exercised. The disjunctive "or" is used between and contrasts the words "military" and "usurped." The

(1) 2 Wils. 363, 365. (2) (1780) 2 Park on Marine Insurance, 657.
(3) [1913] 3 K. B. 411.

words are not "usurped military power." Without using words of rigorous accuracy, military and usurped power suggest something more in the nature of war and civil war than riot and tumult. To sum up, in my view this clause is not merely a riot clause from beginning to end, but it is a riot clause and a war clause combined. In the result the event is within the exception, is not one which is covered by the policy, and as a consequence the claim fails.

This would be sufficient to dispose of the case, but the counterclaim makes it necessary to decide the question of rectification.

As to (3.): Ought the policy to be rectified? The point made was as follows: It was said that the plaintiff had been insured in various tariff companies for a number of years, that these tariff companies had special conditions which would exclude the risk in the present case, that when the first Lloyd's policy was negotiated in 1913 the slip contained the words "special conditions as per company's policy expiring," and that therefore the present policy ought to contain such conditions, which would exclude the claim in the present case. The 1913 policy was certainly subject to these conditions, but when the policy sued on was taken out in 1915 it was with a fresh group of underwriters, and the slip contained the words "conditions as before." Mr. Hatch, who was called on behalf of the defendant, said that this meant, and was understood to mean, that the conditions in the 1915 policy were to be the same as those in the 1914 policy. Now the 1914 policy contained only the words of exception, "insurrection, riot, civil commotion, or military or usurped power." I find that the defendant agreed to give a policy in 1915 with the same words as were contained in the 1914 policy, and that therefore nothing can be added to the 1915 policy which admittedly contained all the words in the 1914 one.

Judgment for defendant.

Solicitors for plaintiff: *Reed & Reed.*
Solicitors for defendant: *Simmons & Simmons.*

J. H. W.

1917
March 16, 30.

HEALEY *v.* SOCIÉTÉ ANONYME FRANÇAISE RUBASTIC.

Master and Servant—Dismissal—Justification—Commission—Salary for current Period.

A servant dismissed for misconduct is entitled to recover arrears of salary due to him.

ACTION tried before Avory J. without a jury.

The plaintiff brought this action to recover damages for wrongful dismissal and commission and arrears of salary. The dismissal of the plaintiff was justified. The misconduct took place in 1915 and preceding years. The salary claimed was for the period from May 31 to October 30, 1915.

Roskill, K.C., and *Cababé*, for the plaintiff.

Hugo Young, K.C., and the *Hon. S. Henn Collins* (for *Rowand Harker*, serving with His Majesty's Forces), for the defendants.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

March 30. AVORY J. (1) Upon the trial of the action the jury found that the dismissal of the plaintiff from his employment as managing director of the defendant company was justified on the ground that during the years 1912, 1913, and 1914 the plaintiff from time to time transmitted to the defendants false and misleading reports, and in the months of January, February, March, and April, 1915, false and misleading accounts, and it was agreed between the parties that the claim of the plaintiff for salary for the months of June, July, August, September, and October, 1915, should be left to me to be determined. It was contended for the defendants that there was no contract of employment between them and the plaintiff. Having considered the opinions of M. de Gorostargu and M. Mesnil, experts in French law, I accept the view of M. de Gorostargu that the effect of art. 6 (3.) of the statute of the defendant

(1) The judgment was written.

company was to substitute the defendant company in the place of the Swiss company and to make them liable to the plaintiff on the contract of service which he had entered into with the Swiss company. I find that the plaintiff assented to this arrangement, and I also find that from the time of the formation of the defendant company to his dismissal the plaintiff served in the capacity of managing director of the defendant company under the terms of the said contract, that the notice to determine the employment was given by the defendant company, and that his salary, though paid directly by the English company, was so paid by arrangement between the English company and the defendants. Under these circumstances it appears to me that the points argued before me on the novation of the contract and the application of the Statute of Frauds do not arise. The plaintiff's employment under the contract was for fifteen years at a salary of 2500*l.* per annum payable monthly, and it was paid at the end of each month up to May 31, 1915. In my opinion the contract was divisible and the salary became due and the right to it vested at the end of each month ; but the defendants contended that it was a condition precedent to the right of payment of the salary that the plaintiff should truly and faithfully serve his employers and that as he had failed in the performance of this condition he was not entitled to recover. The misconduct relied on at the trial took place prior to May, 1915, and, although suspected to some extent, was not made the grounds of dismissal when the contract was determined in October, 1915 ; but the defendants contended that the misconduct was continuing from April to October in the sense that the plaintiff was continuing to mislead and deceive his employers. I cannot accept the view that the omission to confess or disclose his own misdoing was in itself a breach of the contract on the part of the plaintiff, and I think the answer to the defendants' contention is that the contract of employment was in fact existing up to the time of dismissal, and that the right to determine it by reason of antecedent misconduct subsequently discovered does not entitle the defendants to treat it as determined from any earlier date, and that the plaintiff is therefore entitled to recover his salary for the months that he actually served. The only authority that was cited to me in support of the defendants' contention was a decision of Lord Tenterden

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Avory J.

referred to in a note to *Turner* v. *Robinsons* (1), but the decision as there reported appears to me inconsistent with the decision of the Court of Appeal in *Boston Deep Sea Fishing Co.* v. *Ansell* (2), and more particularly with the judgment of Bowen L.J. in that case. On the argument before me it was suggested that the letter of May 24, 1915, was a notice to the plaintiff that his salary would not be paid after May 31, but I cannot regard this under the circumstances as a determination of the contract, and the defendants on the trial admitted that the contract was not in fact determined till October. The only question remaining is the right to salary for the month of October. On the argument before me the plaintiff's counsel contended that the dismissal did not in fact take place till October 31; but the action was brought and the claim was based on an alleged dismissal on October 22, by letter from plaintiff's solicitors on November 3, 1915, and I find that the contract was determined on October 22, and that the plaintiff, therefore, is only entitled to recover for the months completed up to the end of September.

Judgment for the plaintiff for 833*l.*

Solicitors for plaintiff: *Durnford & Son.*
Solicitors for defendants: *Thompsons, Quarrell & Jones.*

(1) (1833) 6 C. & P. 15. (2) (1888) 39 Ch. D. 339.

J. H. W.

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